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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON

THE LAW OF SALES

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AUTHOR OF 'BRIEFS ON THE LAW OF INSURANCE,' "LAW OF MUNICIPAL CORPORATIONS," "ILLUSTRATIVE CASES ON PERSONS AND DOMESTIC RELATIONS,"

"ILLUSTRATIVE CASES ON DAMAGES," "ILLUSTRATIVE CASES ON INSURANCE" AND "ILLUSTRATIVE CASES ON MUNICIPAL CORPORATIONS"

A COMPANION BOOK

TO

TIFFANY ON SALES (2D ED.)

ST. PAUL, MINN.

WEST PUBLISHING CO.

1913

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HORNBOOK CASES ON SALES

FORMATION OF THE CONTRACT

I. Sale Distinguished From Other Transactions¹

SATTLER v. HALLOCK.

(Court of Appeals of New York, 1899. 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686.)

Action by Theodore Sattler, assignee, against George W. Hallock and others, for conversion. From a judgment of the appellate division affirming a judgment entered on a verdict in favor of defendants and an order denying a new trial (44 N. Y. Supp. 543), plaintiff appeals.

MARTIN, J. On the 21st day of February, 1895, 25 farmers, residents of the town of Smithville, L. I., were the owners of a building or premises used as a pickle factory, situated in that town. On that day they entered into a written agreement with the firm of John A. Meierdiercks & Sons, in relation to the production, manufacture, and sale of pickles, sauerkraut, and other like products.

So far as material to the question involved, the contract was substantially as follows: The parties agreed to organize a responsible company or corporation for the purpose of conducting or aiding in the production and manufacture of the articles referred to in the contract. It then provided that the farmers were to prepare and deliver to the plaintiff's assignors, at the factory, pickles, cabbage, dill, etc., to be raised upon an acreage which was given, and at prices stated therein. If the building proved insufficient, the farmers were to provide an additional one at a cost not to exceed \$300, to be paid by the assignors and deducted from the net profits at the end of the season, they guarantying that such profits should amount to at least that sum. If they were more than the cost of the building, then the farmers were to receive 20 per cent. thereof, to be divided between them according to the amount of produce furnished by each. The assignors were to take the pickles, cabbage, and other produce, pay the prices named at the times and in the manner stated, furnish the labor, machinery, barrels, tanks, salt, spices,

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) § 5.

and other necessary material, and pay the freight and cartage. These expenses were to be deducted from the gross receipts of the sales of the pickles, sauerkraut, and other goods so manufactured. A list was then given of the number of acres of each kind of produce which was to be furnished by each of the 25 farmers named. To receive products at the factory, the assignors were to furnish one man and the farmers another, who were to attend to their reception, and decide all matters of dispute in relation to them. The representative of the farmers was to be given full and complete data of all the produce delivered, and all barrels, salt, spices, and utensils furnished, and all the goods of every description received and shipped by the assignors, so as to show the gross receipts and expenses for the year. The agreement then provides: "The manufacture and sale of all the products of the Long Island Farmers' Co. shall be done by J. A. Meierdiercks & Sons. * * * It is hereby agreed by the undersigned, of the Long Island Farmers' Company, that at any time should the business of the Long Island Farmers' Company cease, and the property, including buildings, utensils, bbls., etc., be sold or bartered, the members of the Long Island Farmers' Company, other than J. A. Meierdiercks & Sons, guaranty to J. A. Meierdiercks & Sons 35 per cent. of the amount realized." This agreement was signed by the 25 farmers mentioned, and by the plaintiff's assignors.

Subsequently, the Long Island Farmers' Company was organized in accordance with the contract. By-laws were passed, and the defendants were elected as its managing officers. Soon after the execution of the contract, the plaintiff's assignors went to the factory, proceeded to manufacture the produce which was delivered under it, and continued that business until they made a general assignment to the plaintiff. The keys of the factory were retained by, and continued in the possession of, a representative of the farmers, who, after the produce was delivered at the factory and manufactured, shipped it to various purchasers. During the continuance of this business, the executive officers of the farmers' company, or some of them, were usually present at the factory, and engaged in looking after the business there transacted. They gave directions, passed judgment upon the quality of the produce, and were often consulted by the assignors' representative in regard to affairs connected with the business. Although the manufactured products were sold by the plaintiff's assignors, they were billed, "J. A. Meierdiercks & Sons, Agents Long Island Farmers' Company." These bills were sent, and checks drawn to the order of the company were received, when the assignors requested the committee of the company to give them a power of attorney to indorse them, which it refused to do. On the 17th of September, 1896, the firm of John A. Meierdiercks & Sons made a general assignment to the plaintiff for the benefit of its creditors. Subsequently the plaintiff went to the factory at Smithtown, and demanded all the products, manufactured and unmanufactured, claiming that they

were owned by the assignors at the time of the assignment, and were a part of the assets of that firm. With this demand the managers of the company refused to comply, claiming that by the terms of the agreement the company and the farmers it represented were the lawful owners of such products.

This action was to recover their value at the factory at the time of the assignment, upon the ground that the defendants had wrongfully converted them to their own use. The defendants alleged title in the Long Island Farmers' Company, and that they, as its representatives, were entitled to the possession of the property. Thus is it obvious that the single question involved is whether, under the contract between the parties, the title to the property in suit vested in the plaintiff's assignors and was transferred to him by the assignment, or whether it remained in the farmers' company or the farmers furnishing it. On the trial the court held that the contract imported a sale, but submitted to the jury the question whether, under the facts and circumstances proved, including the acts of the parties, the contract had been substantially altered, so that the title rested in the defendants or the company or persons they represented. The jury found for the defendants. The appellate division, however, held that the evidence was not sufficient to justify the submission of that question to the jury, but that the contract between the parties was one of bailment or partnership, and not of sale, and hence the plaintiff was not entitled to recover, and judgment for the defendants was properly rendered.

With this situation, it is obvious that the determination of the courts below can be sustained only in case the transaction between the parties was a bailment or joint enterprise. If it was a bailment, manifestly the defendants were entitled to retain the possession of the property. If it was a joint enterprise, the plaintiff could not recover in an action for the conversion of the property, as the defendants were entitled to its possession, as against the plaintiff, until the matters arising under the contract were adjusted. We fully agree with the learned appellate division that there was no evidence to justify the trial court in submitting to the jury the question of an alteration or modification of the original agreement. Therefore the real question we are called upon to decide is whether the agreement of the parties imported a sale of the property to the plaintiff's assignors. If it did, and the title passed, then the plaintiff is entitled to recover; if not, then the judgment is right, and should be affirmed. In the construction of contracts, where there is no ambiguity, it is the duty of the court to determine their meaning. Moreover, where the terms and language of the contract are not disputed, its legal effect is a question of law, to be determined by the court. It is always the duty of a court, in construing a written instrument, if possible, to ascertain the intention of the parties; and, in order to determine its proper construction, resort must be had to the instrument as a whole, and effect must be

given to every clause and part thereof, when it can be done without violence. *Ripley v. Larmouth*, 56 Barb. 21.

With these principles in mind, we approach the question whether, under the provisions of this contract, the plaintiff's assignors were bailees of the property, or whether the contract was one of purchase and sale. One of the distinctions between a bailment and a sale is correctly pointed out in the dissenting opinion of Bronson, C. J., in *Mallory v. Willis*, 4 N. Y. 76, 85, as follows: "When the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed." *Foster v. Pettibone*, 7 N. Y. 435, 57 Am. Dec. 530. There are, however, other principles applicable to the question. Thus, when property in an unmanufactured state is delivered by one person to another, upon an agreement that it should be manufactured or improved by his labor and skill, and when thus improved in value should be divided in certain proportions between the respective parties, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completely executed, although the labor to be performed by the bailee may be equal or even greater in value than that of the property when received by him. *Beardsley, J., in Gregory v. Stryker*, 2 Denio, 631.

Again, the relation is that of bailor and bailee, where the property is thus delivered to be manufactured or improved, and afterwards there is to be a sale and a return or a division of the proceeds. *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595. In *Hyde v. Cookson*, 21 Barb. 92, there was a written agreement between the plaintiffs and one Osborn in relation to tanning a quantity of hides. The hides were to be furnished by the plaintiffs on a commission of 5 per cent. for buying and 6 per cent. for selling the leather. Osborn was to take the hides to his tannery, manufacture them into hemlock sole leather, and return it to the plaintiffs, who were to sell it in their discretion. When sold, the account was to be made up, and the net proceeds of the sales, after deducting the costs of hides, commissions, interest, insurance, and other expenses, were to be the profit or loss to accrue to Osborn in full for tanning the hides; and it was held that this was not a contract of sale, but of bailment, and that the title remained in the plaintiffs. In *Pierce v. Schenck*, 3 Hill, 28, logs were delivered at a sawmill under a contract with the person running the mill that he would saw them into boards, and that each party should have one-half. It was held that the transaction was a bailment; that the bailor retained his general property in the logs until they were all manufactured in pursuance of the contract; and that, as between the parties, the bailee acquired no interest in any of the boards manufactured by mere part performance within the time. In *Mallory v. Willis*, 4 N. Y. 76, the plaintiffs agreed to deliver merchantable wheat at a flour mill carried on by the defendant to be manufactured into flour. The defendant agreed to deliver 196

pounds of superfine flour, packed in barrels to be furnished by the plaintiffs, for every 4 bushels and 15 pounds of wheat. He was to be paid 16 cents per barrel, and 2 cents extra in case the plaintiffs made 1 shilling net profit on each barrel of flour. The defendant was to guaranty the inspection. The plaintiffs were to have the offals or feed, which the defendant was to store until sold. This court held in that case that the contract imported a bailment, and not a sale. The doctrine of that case was indorsed in *Foster v. Pettibone*, 7 N. Y. 433, 57 Am. Dec. 530. In *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534, the parties entered into a contract by which the plaintiff agreed to manufacture for the defendant 1,000 pairs of pruning shears, to be in all respects like a sample furnished, the defendant to furnish the rough castings for the handles, and the plaintiff to furnish the blades. It was held that the contract was one of bailment, and not of purchase and sale, so that the title to the shears manufactured was at all times in the defendant.

Applying these principles to the contract under consideration, we think it is quite obvious that it was one of bailment, and not of purchase and sale. Under its terms, the parties represented by the defendants were to furnish certain specified amounts of farm produce, which was to be delivered at a factory owned by them, and manufactured into pickles, sauerkraut, and other similar articles. It was to be received jointly by a representative of the plaintiff's assignors and a representative of the farmers. The plaintiff's assignors were to pay the prices named for the produce furnished, to furnish the labor, machinery, and materials, such as salt, spices, barrels, and other necessary articles and utensils, and to pay the freight and cartage. The amount thus expended was to be deducted from the gross receipts of the sales of the articles manufactured, and the representative of the farmers was to be furnished with a full account of all of the transactions connected with the business. The manufacture and sale of the products of the Long Island Farmers' Company were to be done and made by the plaintiff's assignors, and the net proceeds were to be divided by paying 20 per cent. to the farmers or for their benefit, and the assignors to have 80 per cent. Thus the produce was to be furnished by the persons represented by the defendants, was to be manufactured by the plaintiff's assignors, to be sold as the products of the Long Island Farmers' Company, and the net profits divided. The raw material, which was owned by parties the defendants represent, was delivered to the plaintiff's assignors, to be improved by their labor and skill. It was then to be sold, and the net value divided in the proportions named. So that, clearly within the principle of the *Gregory* and other kindred cases, the owners of the produce thus delivered retained their title to the property until the contract had been completely executed, and this without regard to the value of the labor performed upon it by the plaintiff's as-

signors as such bailees. We think, when this entire contract is examined and understood, it clearly imports a bailment, and not a sale.

It is also quite manifest that the parties understood such to be the nature of the agreement between them. This is shown by the facts that the property, after it was manufactured, was shipped from the factory by the company; that the plaintiff's assignors, acting under this contract, in selling the manufactured produce, caused the bills to be sent to purchasers in the name of the company, with their names thereon as agents; that checks were taken therefor drawn to the order of the company, in accordance with the bills sent; that the assignors asked for a power of attorney authorizing them to indorse the same; that the representatives of the farmers were present at the factory, and that they gave directions as to the management of the business there carried on. All these facts tend to show with convincing certainty that the plaintiff's assignors, as well as the other parties to the contract, understood it to be one of bailment, where the property was to be furnished by the latter, improved by the former, and the net profits divided. If this contract is to be regarded as somewhat indefinite or ambiguous, we may resort to the surrounding facts and circumstances as they existed when it was made to aid us in its interpretation, and also consider the practical construction which the parties have given it. Its interpretation by them is a consideration of importance. As was said by Swayne, J., in *Insurance Co. v. Dutcher*, 95 U. S. 269, 273 (24 L. Ed. 410): "The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done." *Woolsey v. Funke*, 121 N. Y. 87, 24 N. E. 191.

It follows from the conclusion we have reached as to the character of the contract and the relation existing between the parties that the judgment must be affirmed, as the agreement between them constituted a bailment of the property in question, and the plaintiff's assignors acquired no such title as would enable them to maintain an action for its conversion. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

STATE v. STOCKMAN.

(Supreme Court of Oregon, 1896. 30 Or. 36, 46 Pac. 851.)

John R. Stockman was convicted of a violation of the act commonly known as the "Warehouse Act" by shipping wheat, stored in a warehouse of which he was the manager, without the written assent of the holder of the receipt therefor, and he appeals.

BEAN, J. The defendant was convicted of a violation of section 4 of the act of 1885, commonly known as the "Warehouse Act," being section 4204 of Hill's Annotated Laws, by shipping wheat, stored in

a warehouse of which he was the manager, without the written assent of the holder of the receipt therefor. The facts are that at the time of the commission of the alleged crime the defendant was the manager of the Red Crown Roller Mills, a corporation owning and operating a flouring mill in Albany, Or., and engaged in the business of manufacturing flour and other mill products for sale. A part of the mill building was used for the storage of wheat belonging to the company, and such as it might receive from the neighboring farmers. The wheat so stored was all mixed in one common mass, from which the company drew from day to day for the purpose of its business. In September, 1894, one E. D. Barrett delivered to it 2,198¹⁵/₁₀₀ bushels of wheat, for which a receipt in the following form was issued to him:

<p>“No. 1,078. “Received of E. D. Barrett, by self, two thousand one hundred ninety-eight ¹⁵/₁₀₀ bushel No. 1 merchantable wheat, subject to sacks and storage, .08 cents per bushel, if withdrawn from mill. “2,198¹⁵/₁₀₀ Bu.</p>	<p>“Red Crown Mills, Albany, Oregon, Sept. 18, 1894. “Red Crown Roller Mills, Lyons.”</p>
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Immediately upon the receipt of the wheat, it was, with the knowledge and consent of Barrett, mixed and mingled with the other wheat on hand at the time, and was subsequently manufactured into flour by the mill company, and sold for its own use and benefit. No storage was paid or demand made for the wheat until after the failure of the company in March, 1895, when Barrett demanded the then market value thereof, which, being refused, he tendered the storage, and demanded a return of the wheat, and obtaining neither, commenced this prosecution.

The indictment charges that the defendant, as the manager of a warehouse for the storage of grain, received for storage therein the wheat in question, issued a receipt therefor, and afterwards sold, shipped, transferred, and removed the same from such warehouse, and beyond his control, without the written assent of the holder of the receipt. In order to sustain this charge, it was incumbent upon the state to prove that the wheat in question was in fact placed in a warehouse, within the meaning of that term as used in the statute, and, in addition thereto, that it was placed therein on storage. A failure of proof in either particular would necessarily be fatal to the prosecution. Upon its face the receipt issued to Barrett affords no solution of either of these questions, for it is silent as to whether the building was in fact a warehouse, and as to whether the wheat was received on storage, or for some other purpose; and therefore resort could be had to parol evidence to ascertain the true character of the business in which the mill company was engaged, as well as the terms on which the wheat was received. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311.

Upon the trial, evidence was given and offered tending to show, and

from which the jury could have found, that the mill company did not receive grain for storage or safe-keeping, but that, according to its usual course of business, known to its customers, and particularly to Barrett, all wheat received by it was mixed with, and became a part of, the consumable stock of the mill, and was manufactured into flour and other mill products, and sold and disposed of by the mill company in the usual course of business, and that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat. In the former case no storage was charged or paid, but in the latter a charge of eight cents a bushel was made for sacks and storage; and this accounts for the provision in the receipt to Barrett concerning the payment of storage if the wheat should be withdrawn from the mill.

Assuming these facts to be true, as we must for the purposes of this appeal, the question of law is presented as to whether the transaction comes within the provisions of the act of 1885. And, as its solution involves the merits of the entire theory upon which the cause was tried in the court below, we shall proceed to examine it without incumbering the opinion with a statement of the various ways in which the question was raised during the progress of the trial. It is conceded by counsel for the state, as we understand them, that if, assuming the facts stated to be true, the corporation of which defendant was the manager was not engaged in the warehouse business, or if the wheat was not received on storage, within the meaning of the statute, the judgment from which this appeal was taken is erroneous, and should be reversed.

The statute in question (Laws 1885, p. 61; 2 Hill's Ann. Laws Or. § 4201 et seq.) is entitled "An act to regulate warehousemen, wharfingers, commission men and other bailees, and to declare the effect of warehouse receipts," and makes it the duty of every person owning or operating "any warehouse, commission house, forwarding house, mill, wharf or other place where grain, flour, pork, beef, wool or other produce or commodity is stored," to deliver to the owner thereof a warehouse receipt, which "shall bear the date of its issuance and shall state from whom received, the number of sacks if sacked, the number of bushels or pounds, the condition or quality of the same and the terms and conditions upon which it is stored"; prohibits the issuance of fraudulent receipts, or for a commodity "not actually in store at the time of issuing such receipt"; prohibits the bailee from mixing commodities of different qualities or grades; provides that no person operating "any warehouse * * * or other place of storage" shall sell, incumber, ship, transfer, or remove, beyond his custody or control, any grain or other produce, for which a receipt has been given by him, without the written consent of the holder of the receipt; makes all checks or receipts given by any person operating "any warehouse * * * or other place of storage," for any grain or other commodity

"stored or deposited," and all bills of lading and transportation receipts of any kind, negotiable; provides that the same may be transferred by indorsement, which shall be deemed a valid transfer of the commodity represented thereby; that on the presentation of the receipt given by any person operating "any warehouse * * * or other place of storage" for grain or other produce, and payment of all the charges due thereon, the owner shall be entitled to the immediate possession of the "commodity named in the receipt"; that it shall be the duty of the warehouseman or bailee to deliver the same to him; and the violation of any provision of the act is thereby made a penal offense, punishable by fine, or imprisonment, or both.

From this summary, it is apparent that the statute, as its title and contents clearly indicate, is designed to cover the special business of warehousemen, wharfingers, commission men, and other bailees who are engaged in receiving and storing the goods of others as a business. Its principal object is to make warehouse receipts negotiable, and to protect the rights of the holders thereof, by requiring the warehouseman or bailee to keep constantly on hand the specific goods stored, or a sufficient portion of the bulk of which they become a part, to satisfy his outstanding receipts. In short, it was designed to compel a warehouseman or other like bailee, under the penalties of a criminal prosecution, to live up to and abide by the contract of bailment. But the evil sought to be remedied by this legislation and the remedy sought to be applied alike show that it never was within the legislative mind that it should apply to a case where the bailee has the right, under the contract, express or implied, to sell or use the goods committed to his care. In such case, in the very nature of things, there can be no storage or bailment; but the transaction is, in essence, a sale of the commodity, and an extension of personal credit to the bailee.

There is an inherent difference, recognized by all the authorities, between a bailment and a sale. In the one case, the property remains in the depositor, and the bailee is but the custodian of the thing, with no right to use or dispose of it in any way; while, in the other, he may use it as his own, the depositor relying upon his personal credit for its value, either in money or kind. A warehouse, therefore, within the meaning of this statute, is a place where any of the commodities enumerated therein is received on storage for the owner, by some person or corporation engaged in the general business of receiving such goods in store for compensation or profit. *Bucher v. Com.*, 103 Pa. 528; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *State v. Bryant*, 63 Md. 66. Under the rule in this state, wheat stored with a warehouseman does not cease to be a bailment, within the meaning of this act, because it is, by the consent of the depositor, mixed with other wheat of like grade and quality (*McBee v. Ceasar*, 15 Or. 62, 13 Pac. 652); but, when it is delivered and received under an agreement, express or implied from the course of dealing, that the person to whom it is delivered may use it as a part of his consumable stock, and fulfill

his obligation to the owner by either paying its market value when demanded or returning an equal amount of other wheat of like grade and quality, the transaction is not a bailment or storage, within the meaning of the statute, and the depositce cannot be convicted of a crime for doing that which he is permitted to do by the very terms of his contract. *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *McCabe v. McKinsty*, 5 Dill. 509, Fed. Cas. No. 8,667; *Andrews v. Richmond*, 34 Hun, 20; *Johnston v. Browne*, 37 Iowa, 200; *Nelson v. Brown*, 44 Iowa, 455.

Now, as already suggested, there was evidence in this case tending to show (1) that the company of which the defendant was the manager was not engaged in the business of receiving grain on storage for the owner, and so was not a warehouse keeper, within the meaning of the statute; and (2) that, if it was keeping a warehouse for the storage of grain, the Barrett wheat was not so received. The case, therefore, should have been submitted to the jury, with a direction that they could not convict unless they were satisfied, from the evidence, that the place where the grain was deposited was, in fact, a warehouse for the storage of grain, and that it was received there on storage, and not on an agreement, express or implied, that the mill company might use it in the course of its business. And, because these questions were not so submitted to the jury, the case must be reversed, and a new trial ordered.

II. Who Can Sell ²

COMMERCIAL BANK OF SELMA v. HURT.

(Supreme Court of Alabama, 1892. 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38.)

Action of detainee by H. H. Hurt against Phillips & Parish for eight bales of cotton, to which the Commercial Bank of Selma interposed claim. There was judgment for the plaintiff, and claimant appeals.

WALKER, J.³ The claim of the appellant, the Commercial Bank of Selma, to the cotton involved in this suit rests upon a transfer and delivery by the H. C. Keeble Company of warehouse receipts therefor as collateral security for a note made by that company to the bank. The H. C. Keeble Company was a corporation engaged in business as a cotton factor and grocery merchant in the city of Selma. The appellee, who was the owner of the cotton, had had it shipped to that company, with instructions not to sell it until or-

² For discussion of principles, see Tiffany, Sales (2d Ed.) § 11.

³ The statement of facts is abridged and part of the opinion is omitted.

dered to do so. The consignee had the cotton stored in the warehouse of Phillips & Parish, and took the warehouse receipts therefor in its own name. No advances were made to the appellee on this cotton, and there is no evidence that he authorized the consignee to store it and take the warehouse receipts in its own name, or to pledge the cotton itself, or the warehouse receipts. Under the common law, a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use. Unless the result is controlled by some statute, the attempted pledge does not work a divestiture of the title of the principal, and the party receiving such a pledge and advancing his money acquires no right to the property as against the principal, whether he knew he was dealing with a factor or not. *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Voss v. Robertson*, 46 Ala. 483; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; 1 *Lawson, Rights, Rem. & Pr.* § 229. * * *

If the H. C. Keeble Company, instead of having the cotton stored in the warehouse of Phillips & Parish, had retained possession of it until, without any authority or license from the appellee, the cotton itself was delivered to the bank in pledge to secure the payment of the note of the H. C. Keeble Company, it is plain that the bank would not have acquired any greater title to the property than that company had to confer, and the appellee would have been entitled to recover the cotton from the bank, or to hold the bank liable for its conversion. But it is claimed that the factor, having stored the cotton in a warehouse, and obtained warehouse receipts therefor to itself, was enabled, by the transfer of those receipts, to confer upon the bank a claim to the cotton which must prevail against the title of the true owner. Section 1178 of the Code is relied upon as giving this effect to the transfer of warehouse receipts by the persons to whom they are issued. The clause of that section upon which this claim is based is in the following words: "The receipt of a warehouseman, on which the words 'Not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person."

Sections 1175, 1177-1179, of the Code, are based upon an act approved February 28, 1881, entitled "An act to prevent the issue of false receipts, and to punish the fraudulent transfer of property by warehousemen, wharfingers, and others." Acts Ala. 1880-81, p. 133. In the process of codification the provisions of that statute were redrafted, and somewhat modified. But the provisions of the four sections above mentioned are all in furtherance of the main legislative purpose, which was indicated in the title and in the corresponding sections of the original act. So far as warehouse receipts are concerned, the purpose of the statute is, in the first place,

to prevent the issue of such receipts, unless the property therein described has been actually received, and is in the possession of the person issuing the receipt. This purpose is manifested in section 1175 of the Code. The purpose, in the next place, is to give definite legal recognition to such receipts as true tokens of the possession of the property described in them; and to regulate the manner in which the holder of such a token of possession may, by an assignment of it, convey his interest in the property described as effectually as he could by a transfer and delivery of the property itself. The provisions to this end are embodied in sections 1177-1179.

Undoubtedly it was the intention of the legislature to facilitate and throw safeguards around dealings in personal property by the use of paper representative of it. To this end the holder of a warehouse receipt is so far treated as the possessor of the property mentioned in it that his transfer of the receipt, in the mode prescribed by the statute, operates in the same manner as the direct delivery of the property itself would do. The transfer of the receipt is given effect as a symbolical delivery of possession. The statute does not undertake to make the receipt better evidence of title than the actual possession of the property itself. We cannot conceive that it could have been within the contemplation of the legislature that the provisions of the statute would enable a thief, by depositing the stolen property with a warehouseman, and obtaining a receipt for it in due form, to confer upon an innocent purchaser for value and in good faith a claim to the property which would prevail against that of the true owner.

In *Collins v. Ralli*, 20 Hun, 246, it was held that a New York statute substantially identical with the provision above quoted did not protect the purchasers for value and in good faith of warehouse receipts, when the possession of the cotton they represented by the person to whom they were issued had been larcenous. After quoting the statute, the court said: "The learned counsel for the defendants insist that the provisions of this section afford them complete protection against a recovery in this action; that, having purchased the cotton upon the faith of the negotiable warehouse receipts, and paid therefor full market value, this case falls within the spirit and the letter of the section. All the other sections of this act, except the last, which is unimportant, prohibit the issue of false receipts, etc., and prescribe the penalty for a violation of their provisions. The scope and object of the act, therefore, seems to be to protect the mercantile community against fraudulent practices by warehousemen, wharfingers, and others, in respect to these receipts for goods stored or represented to be stored with them. That this is the purpose is shown by the title of the act. * * * The clause 'warehouse receipts given for any goods * * * stored or deposited with any warehouseman' means receipts given for goods so

stored or deposited by any person having the title thereto, real or apparent, or authority of such person therefor. This section of the act proceeds upon the assumption that the receipt is so issued. Any other construction would enable warehousemen to issue receipts for goods, known by them to be stolen, and so convey title to them, or even themselves to commit larceny, and, by issuing receipts for the stolen property, defraud the plundered owner of all title to and power of reclaiming it. Such a construction would work a change in the law hardly contemplated by the legislature when the act under consideration was passed, and yet the construction insisted upon by the defendants would accomplish precisely this result. Courts often have to look beyond the mere words of a statute in determining its meaning, and give to it such an interpretation as the mischief sought to be cured and the evident intention of the legislature indicate." The judgment in that case was affirmed by the court of appeals, (*Collins v. Ralli*, 85 N. Y. 637,) and the decision has been approved in subsequent cases, (*Hentz v. Miller*, 94 N. Y. 64; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843).

To put it in the power of a factor to give effect to an unauthorized pledge of the property of his principal by resorting to the device of pledging a receipt for the property instead of the property itself, would as clearly be an abridgment of the common-law rights of the owner as it would be to allow a thief, by using a receipt for the stolen property instead of the property itself to defeat the common-law right of the owner to reclaim the stolen property in whosoever hands it may be found. The statute under consideration does not purport to deal with the right of the owner of personal property to recover it from the one who claims under a disposition of it which was unauthorized by the owner. The object in view being to recognize dealings in personal property by the use of certain tokens of its possession, to prevent the issue of such tokens except when the property mentioned in them has actually been received by the persons issuing them, and to regulate the transfer of the property by assignment of the token, as a substitute for actual delivery of the property. The statute was framed on the assumption that the possession of the property by the person to whom the token was issued was accompanied by ownership and a right to dispose of it, and questions presented by the assertion of a paramount claim to the property were not dealt with by the statute, but were left to be determined by existing laws governing the right of the true owner of property to follow and reclaim it in the hands of persons claiming under an unauthorized disposition of it by one not the true owner, but in actual possession of it.

There is evidence in section 1178 of the Code of the absence of any intention to enable the holder of a warehouse receipt, by a transfer of it by indorsement, to confer any better claim to the property than

he could if he had not stored the property with a warehouseman, but had invested the person with whom he dealt with actual possession of it. Immediately after the clause already quoted from that section is the following provision: "But this section must not be so construed as to affect or impair the lien of a landlord on such things or property for rent or advances, or to affect or impair any lien thereon created by contract, of which notice is given by registration in the manner prescribed by law." It is not to be supposed that the legislature was more solicitous to protect the rights of lienholders than those of the owners of the property. The assumption is that it is the owner who has had the property stored and obtained a warehouse receipt for it, and the provision just quoted simply makes it plain that he cannot, by a transfer of the receipt, any more than he could by a disposition of the property accompanied by an actual delivery of possession, affect or impair liens upon it.

It is further provided in the same section that, "in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; and if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without delivery or cancellation of such receipt, or without indorsement thereon." The first of these two clauses shows that it was assumed that the receipt was issued to the rightful owner of the property. The second of them shows that it was no part of the legislative intention to make the fact that his receipt is outstanding a protection to the warehouseman against paramount claims to the property, or to displace, in the case of the issue of a warehouse receipt to another, the common-law rules governing the rights of the owner to recover his property from a stranger claiming under a disposition of it not binding on him.

The apparent object of the statutory provisions in reference to warehouse receipts is to give them, for purposes of commerce, recognition and credit as substitutes for the property described in them, and to give dealings in them the same effect as similar dealings with the property itself. We think that they are made negotiable only in the sense that in their passage through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. No intention is disclosed to give dealings in them any more controlling effect upon the title to the property they represent than would be given to similar dealings with the property itself. At last they are mere tokens of possession, and no guaranties of title by the persons issuing them. The warehouseman holds himself out as the custodian for the legal holder of the receipt of the property mentioned in it, but he does not

warrant the title of the property against the claims of strangers to the contract of storage. * * *

In *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892, it was recognized that a statute declaring that bills of lading "shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes," should not, in the absence of language clearly evidencing such an intention, be construed as effecting such an innovation upon the common-law right of the owner of property to protection against its misappropriation by others that such misappropriation could be successfully made by the use of a symbol or representative of the property, when it would not prevail against the claim of the owner if the possession of the property itself had been acquired in a similar manner. In *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, the proposition was stated and applied that it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title; and it was decided that the correctness of this proposition was not affected by a statute which provided that bills of lading or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading, and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified." * * *

Our conclusion is that it would be a perversion of the manifest purpose of the statute to construe it as having the effect of putting the symbol of the property upon a higher plane, as an evidence of title, than the actual possession of the property it describes. The statute does not undertake to make the transfer and delivery of the symbol more than the equivalent of an actual transfer and delivery of the property itself.

Conceding that the clause in the contract of pledge, "which cotton has been advanced upon by us to its full value," does not show that the pledgor's character as a factor was recognized in the transaction, and that it was the intention of the parties to limit the operation of the pledge to the pledgor's actual interest in the cotton by reason of advances made upon it, we have, then, the simple case of a pledge by a factor of the property of his principal for his own use. The warehouse receipts which he obtained are to be regarded as the cotton itself which he held in the capacity of an agent to sell. We have no "factors' act" to raise up a statutory estoppel against the owner, based upon his act in intrusting the factor with possession of the goods, or documentary evidence of ownership and right of disposal, and thereby leading innocent third persons to deal with the factor on the faith of his apparent ownership. There is nothing to

take this case out of the influence of the common-law rule, which protects the owner of personal property against an unauthorized pledge of it by one who held it merely as factor or as agent to sell.

The original defendants, the warehousemen, having disclaimed all interest in the suit, the plaintiff was entitled to recover his cotton, and the claim of the bank, based upon the attempted pledge by the H. C. Keeble Company, presented no legal obstacle to the plaintiff's recovery. * * * Affirmed.

GUINZBURG v. H. W. DOWNS CO.

(Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525.)

Bill by William Guinzburg against the H. W. Downs Company to establish plaintiff's ownership of shares in defendant corporation, and to enforce his rights as stockholder. Reserved for the consideration of the supreme judicial court.

ALLEN, J. A pledgee, on default in the payment of his debt, may sell the pledged property at public auction, giving to the pledgor notice of the time and place of sale. Washburn v. Pond, 2 Allen, 474; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. 962. But in making such sale he is bound to exercise reasonable skill and diligence in order to get the value of the property. Newsome v. Davis, 133 Mass. 343; Clark v. Simmons, 150 Mass. 357, 23 N. E. 108. This includes the fixing of a reasonable time and place of sale. Markham v. Jaudon, 41 N. Y. 235, 243.

The facts reported in the present case are somewhat meager. For instance, we do not know what public notice was given of the sale, nor whether the price obtained was much, if any, below the value of the shares. We are much inclined to think the place of sale was an unreasonable one. The pledged property consisted of over one-third of the whole number of shares in a small Massachusetts corporation, whose whole capital stock was only \$16,000. None of the stock had ever been sold at auction in New York, and it was not listed. It did not appear that it was known in New York. The note for which the stock was pledged was made and delivered in Massachusetts, and was payable here, and the pledge was made here. The pledgee was a New York corporation. Under these circumstances, it would have been better to make the sale in Massachusetts. But it appears that the Downs Company, which was the pledgor, and its officers, whose names were also on the note, all received notice of the proposed sale on July 20, 1894, and the sale was fixed for July 24th; and the pledgor and its officers, after the receipt of the notice, did not communicate with the pledgee, or take any action in regard to the said notice or the proposed sale. Since all the parties whose names were on the note had notice for this length of time, and omitted to make any protest or ob-

jection to the place or time of sale, and took no action whatever in regard to the notice or proposed sale, we think this omission and silence amounted to a waiver of objection on this score, and that they cannot now be heard to complain that the place was unreasonable. See *Metcalf v. Williams*, 144 Mass. 452, 455, 11 N. E. 700. The fact that there was only one bidder does not render the sale invalid. *Learned v. Geer*, 139 Mass. 31, 29 N. E. 215.

On the facts reported, the sale was valid, and the plaintiff is entitled to a decree in his favor. Decree for the plaintiff.

SCOLLANS v. ROLLINS.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284.)

Actions by T. J. Scollans against E. H. Rollins & Sons. There were judgments for defendants, and plaintiff excepts.

BARKER, J. The documents for the conversion of which these actions are brought are described in the bill of exceptions and in the several declarations as bonds of the city of Boston. Upon inspection of the copy which is part of the bill, although the documents bear upon their faces the words "Registered Bond," they do not appear to have been under seal. Each document certifies that there will be due from the city, payable at the office of the city treasurer on the 1st day of April, 1913, to William Scollans, the sum of \$1,000, with interest at 4 per cent. per annum, payable on the 1st day of April and October in each year. Each also bears upon its face a statement that it is transferable only at the office of the city treasurer. From this it results that, whether technically bonds or promissory notes, the documents were not negotiable paper, and could not be made negotiable by any act or indorsement of William Scollans, the payee. When, intending to part with the property in the documents and in the rights of which they were the evidence, William Scollans delivered them to the plaintiff in payment of a debt, the property in the documents and in the rights passed to the plaintiff. When so delivered to the plaintiff, each document bore upon its reverse side a stamped writing, signed by William Scollans, and acknowledged by him before a justice of the peace to be his free act and deed. This stamped writing was of the following tenor: "Value received, I assign * * * the within certificate of the city of Boston stock, and hereby authorize the transfer thereof on the books of the city treasury." These indorsements neither made nor purported to make the documents negotiable securities within the meaning of the law merchant. The documents remained in the same condition when they were stolen, or feloniously embezzled, by a person who delivered them in the same condition to a bank as pledgee, and when they were sold at auction by that bank to the defendants, who

thereupon filled in with their firm name the blank in each indorsement, and presented the documents to the city officials for cancellation, and received in return new certificates payable to themselves.

Under our decisions the property of the real owner of documents of the nature of those now in question is not divested by a sale to a purchaser in good faith and for value from one who has got them feloniously from the true owner, nor by any subsequent dealing of such a purchaser with the documents, but the property remains with the true owner, from whom they were feloniously taken. The real ownership in such documents follows the general rule as to the ownership of chattels, the only exception to which is as to property which consists of the currency of the country, or securities which, by the law merchant, are negotiable. *O'Herron v. Gray*, 168 Mass. 573, 575, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411. See, also, *Dame v. Baldwin*, 8 Mass. 518; *Jarvis v. Rogers*, 13 Mass. 105; *Id.*, 15 Mass. 389; *Mason v. Waite*, 17 Mass. 560; *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488, 57 Am. Dec. 120; *Riley v. Power Co.*, 11 Cush. 11; *Wyer v. Bank*, 11 Cush. 51, 59 Am. Dec. 137; *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Gilmore v. Newton*, 9 Allen, 171, 85 Am. Dec. 749; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Hinckley v. Railroad Co.*, 129 Mass. 52, 37 Am. Rep. 297; *McCann v. Randall*, 147 Mass. 81, 94, 17 N. E. 75, 9 Am. St. Rep. 666; *Bank v. Simmons*, App. Cas. (1892) 201, 215; *Bank v. Cady*, 15 App. Cas. 267; *Earl of Sheffield v. Bank*, 13 App. Cas. 333; *London & County Banking Co. v. London & River Plate Bank*, 20 Q. B. Div. 232; *Cole v. Bank*, L. R. 10 C. P. 354; *Crouch v. Credit Foncier of England*, 8 Q. B. 374; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Power Co. v. Robinson* (C. C.) 52 Fed. 520.

As the plaintiff is yet the true owner of the documents which the defendants have surrendered for cancellation, and for which they have in return received new certificates, payable to themselves, the defendants cannot sustain the verdicts which were ordered in their favor, except by showing that the evidence offered would, as matter of law, show that the plaintiff is estopped from setting up his true ownership as against them. Such an estoppel must bear looking at from two sides. The indorsements upon the documents, when the defendants took them, contained a blank the presence of which made it uncertain whether the payee had parted with his title. The presence of the blanks informed the defendants that the instruments passed to them must be other than they were to give the defendants a right to surrender them for cancellation, and to receive new certificates in exchange. Such blank transfers are consistent with the continued own-

ership of the person who has executed them, and are also consistent with the ownership of some other person than the bearer; and where they do not purport, in terms, to confer ownership upon the bearer, the most which can be predicated of them, in the absence of evidence of custom or usage, is that they are made in aid of the true title, and not to defeat it, and that they are to be used only to help the true owner in procuring for himself the right of registration and the other rights of which the documents so indorsed are the evidence. See *France v. Clark*, 26 Ch. Div. 257. There was no evidence in the present case that such certificates with blank assignments pass in fact from hand to hand, like negotiable instruments, without inquiry as to the right of the bearer to dispose of them. Without such evidence we cannot assume that these documents were "in order," so as to make the act of taking them without inquiry as to how the title, originally in the payee, had come down to the bank of which the defendants bought "the act of a reasonable man reasonably dealing with matters of business." See *Williams v. Bank*, 38 Ch. Div. 400, and *Bank v. Cady*, 15 App. Cas. 267, 270. Unless it is the custom to regard such documents so indorsed as equivalent to securities to bearer, the blanks should have put the defendants upon inquiry, and they would not be in a position to contend that the true owner is estopped from asserting his title.

Again, examining this contention of title by estoppel in the light of the plaintiff's own conduct, we are of opinion that it cannot be said, as matter of law, upon the evidence, that his conduct has been such as to prevent him from asserting his title against any one. The plaintiff has neither himself made, nor knowingly allowed to be made, any representation that the bearer of these documents with their assignments could transfer the property in them. If the possession of the certificates by the bank with the blank assignments indorsed enabled the bank of which the defendants bought to make in substance such a representation to the defendants, the giving of that possession was not the act of the plaintiff, and was possible only because of the commission of a felony against him, of which he was not cognizant, and for which he was not responsible.

The only other possible ground for an estoppel is negligence. While the plaintiff intrusted these documents to persons whose business it was, as bankers and brokers, to sell securities, he did not intrust them to the depositary for sale or to pledge, but simply for safe-keeping; and he had good reason to suppose that the documents remained in a safe, in an envelope marked with his own name, and sealed. The fact that the custodians of his securities were bankers and brokers, he not intrusting the securities to them in that capacity, did not make him responsible for an unauthorized sale, possible only through the commission of a felony. See *Cole v. Bank*, L. R. 10 C. P. 369; *Wood v. Rowcliffe*, 6 Hare, 183; *Lamb v. Attenborough*, 1 Best & S. 831; *Heyman v. Flewker*, 13 C. B. (N. S.) 519; *Jenkyns v. Usborne*, 7 Man. &

G. 678; *McEwan v. Smith*, 2 H. L. Cas. 309; *Kingsford v. Merry*, 1 Hurl. & N. 503; *Hardman v. Booth*, 1 Hurl. & C. 803. If, therefore, he was negligent, either in intrusting the certificate to his depositaries for safe-keeping, or in not withdrawing them when he found that he had been credited with the certificates in account, and was falsely informed that they were still in the safe, or in continuing to trust to the honesty and integrity of his depositary, that negligence would seem not to have entered into the transaction by which the defendants bought and paid for the certificates, and not to have been a proximate cause of their purchase. See *O'Herron v. Gray*, 168 Mass. 573, 577, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411, and cases cited. See, also, *Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *White v. Duggan*, 140 Mass. 18, 20; *Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9, 14, 41 L. R. A. 617, 68 Am. St. Rep. 446.

However this may be, we are of opinion that it cannot be held as matter of law that the plaintiff, upon the evidence offered, was guilty of negligence. He had at least the right to have that question passed upon by a jury. Exceptions sustained.

O'CONNOR'S ADM'X v. CLARK.

(Supreme Court of Pennsylvania, 1895. 170 Pa. 318, 32 Atl. 1029, 29 L. R. A. 607.)

Replevin by John O'Connor's administratrix against John Clark. Judgment for plaintiff, and defendant appeals.

STERRETT, C. J. If there is nothing more in this case than the facts recited by the learned trial judge in the excerpt from his charge quoted in the first specification of error, the instructions therein given to the jury to find for the plaintiff if they believed the testimony would be substantially correct. The only facts of which this instruction is predicated are (1) that the wagon in question was the property of John O'Connor, the original plaintiff; and (2) that Tracy, without his permission, took it, and sold it, or attempted to sell it, to the defendant as his own. But these are not the only facts of which there was evidence before the jury.

On defendant's behalf, it is contended that the testimony tended to prove, and the jury, if they had been permitted, would have been warranted in finding, that defendant purchased the property in question from Tracy in the honest belief that he was in fact the owner thereof; that the name and occupation of Tracy—viz. "George Tracy, Piano Mover"—were on the wagon when he offered it for sale, and that fact was referred to as indicating his ownership of the property, etc.; that, Tracy being a stranger, defendant was specially careful to inquire and inform himself that the person who was in possession of and offering to sell the wagon was the George Tracy whose name and occupation were painted thereon; that Tracy's name

and occupation were put upon the wagon with the knowledge of O'Connor, the original plaintiff, and himself, and by direction of the former, for the purpose of creating the impression and inducing the public to believe that the property belonged to Tracy, and was being used by him in his business as a piano mover, in which he had theretofore been engaged. Without attempting to summarize the testimony relied on by the defendant, it is sufficient to say that it tends to prove substantially the state of facts above outlined, and especially that the original plaintiff, for his own gain and benefit, was a party to the arrangement whereby Tracy's name was put on the wagon for the purpose of misleading the public into the belief that the property was his, and that defendant, acting with due caution and in good faith, was thus misled as to the ownership of the property, and purchased the same from Tracy.

While the soundness of the general rule of law that a vendee of personal property takes only such title or interest as his vendor has and is authorized to transfer cannot for a moment be doubted, it is not without its recognized exceptions. One of these is where the owner has so acted with reference to his property as to invest another with such evidence of ownership, or apparent authority to deal with and dispose of it, as is calculated to mislead, and does mislead, a good-faith purchaser for value. In such cases the principle of estoppel applies, and declares that the apparent title or authority, for the existence of which the actual owner was responsible, shall be regarded as the real title or authority, at least so far as persons acting on the apparent title or authority, and parting with value, are concerned. Strictly speaking, this is merely a special application of the broad equitable rule that, where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud.

Assuming, in this case, that a jury, under the evidence, should find—as we think they would be warranted in doing—that such marks of ownership were placed on the property by direction of O'Connor, the real owner, as were not only calculated to deceive, but actually intended to deceive, the public, and that by reason thereof, and without any fraud or negligence on his part, the defendant was misled into the belief that Tracy was the real owner, and he accordingly bought and paid him for the property, can there be any doubt, as between the real owner and the innocent purchaser, that the loss should fall upon the former, by whose act Tracy was enabled to thus fraudulently sell and receive the price of the property? We think not. In *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Id.*, 58 N. Y. 73, 17 Am. Rep. 208,—a well-considered case, involving substantially the same principle,—it was held that to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person, without his as-

sent, two things must concur: "(1) 'The owner must have clothed the person assuming to dispose of the property with the apparent title to or authority to dispose of it. (2) 'The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."

Without further consideration of the questions involved, we think the testimony to which reference has been made tended to prove facts which, if found by the jury, would have brought the case within the principle of estoppel above stated, and that the learned judge, by the instructions above complained of, virtually withdrew the effect of that testimony from the consideration of the jury. In defendant's second point, he was requested to charge: "If the jury find from the evidence that the plaintiff's intestate allowed Tracy to put his name on the wagon, and made no effort to efface it, and thereby allowed the defendant to be misled, their verdict must be for the defendant." This was refused, with the remark that he had already instructed them that their verdict ought to be for the plaintiff in the event of their believing the testimony.

It follows from what has been said that the first and third specifications should be sustained. The second specification is dismissed. As presented, defendant was not entitled to an affirmance of the point therein recited. Judgment reversed, and a *venire facias de novo* awarded.

JETTON v. TOBEY.

(Supreme Court of Arkansas, 1896. 62 Ark. 84, 34 S. W. 531.)

Replevin by A. P. Jetton against Franklin Tobey. There was a judgment for defendant, and plaintiff appeals.

BATTLE, J.⁴ Three creditors of David B. Looney, to wit, Fleetwood Morris, R. M. Jetton, and J. P. Falconer, brought three separate actions against him before a justice of the peace of Sebastian county, each one suing for himself, and causing an order of attachment to be issued in his case. A. P. Jetton was duly appointed special constable to serve process in the action instituted by R. M. Jetton. A mare and other property of the defendant were attached, the mare being first attached in the suit instituted by R. M. Jetton, and thereafter in the other two actions. After this the attaching creditors met to divide the property among themselves, some witnesses say, for the purpose of saving costs, and to hold subject to the attachments, and another says, for the purpose of paying the debts of the defendant to themselves, the brother of the defendant, who had possession of the property at the time it was attached, assenting.

⁴ Part of the opinion is omitted.

In the division the mare was delivered to Falconer, who carried her to Franklin county, and sold her to Franklin Tobey on a credit.

Thereafter A. P. Jetton, who served the order of attachment sued out by R. M. Jetton, demanded the mare of Tobey, and, he refusing to comply with the demand, brought this action against him for her possession in Franklin county. The property sued for was delivered to the plaintiff. In the meantime David B. Looney, having been absent, returned, and compromised and paid his indebtedness to Morris and R. M. Jetton; and the three actions against Looney were dismissed, the attachments were discharged, and the mare was returned to him (Looney) by A. P. Jetton, who had previously gained possession of her by the suit against Tobey. The dismissal of the action of Jetton against Looney and the discharge of the attachment therein were subsequent to the institution of the suit against Tobey. There does not appear to have been any payment of the indebtedness of Looney to Falconer.

In the trial of the issues in the action against Tobey the foregoing facts were shown by the evidence. It was further shown that Tobey had no notice of any defect in the title of Falconer to the mare at the time he purchased her. * * *

The jury returned a verdict in favor of the defendant. A judgment was rendered accordingly, and the plaintiff appealed.

The jury were virtually told by the instructions of the court that if Tobey purchased the property in controversy in good faith, without any notice of any defect in the title of his vendor, he was entitled to recover, notwithstanding the person from whom he purchased had and was entitled to nothing more than possession. That is not true.

A general rule of the law of personal property is that no man can sell that which he has not, and is not authorized by the owner to transfer, or confer a better title than that he has. An honest purchaser under a defective title cannot hold against the true proprietor. "No one can transfer to another a better title than he has himself, is a maxim," says Chancellor Kent, "alike of the common and civil law, and a sale *ex vi termini* imports nothing more than that the bona fide purchaser succeeds to the rights of the vendor." To this rule, however, there are exceptions. Among them are enumerated the following: Transfers of money, bank bills, checks, and notes payable to bearer, or transferable by delivery in the ordinary course of business to a person taking them bona fide and paying value for them (*Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278); bona fide purchases from fraudulent buyers, or others having a voidable or defeasible title; and, in England, sales in market overt, an exception which does not prevail in this country. * * *

The mere possession of personal property, without other evidence of title, or authority from the owner to sell, will not enable the possessor to confer a better title than he actually has. As said by Chief

Justice Brickell in *Leigh v. Railroad Co.*, 58 Ala. 178: "Possession is prima facie evidence of the ownership of all species of personal property. It is but prima facie, and whoever deals alone on the faith of it must accept it as such, and in subordination to the paramount title, which would prevail over it if the possession was not changed by the transaction into which he enters. If this be not true, a felon acquiring possession by theft could, by a sale to an innocent purchaser, divest the true owner of his property. A naked bailee, intrusted with possession, could dispose of goods to the prejudice of his principal. A case does not fall within the exception unless the owner confers on the vendor other evidence of ownership, or of authority to dispose of the goods, than mere possession." As an example take the case of *Simpson v. Shackelford*, 49 Ark. 63, 4 S. W. 165. The owner in that case conditionally sold and delivered a corn mill, with the understanding that the title would remain in him until the purchase money was paid. The vendee sold to another without any notice of any defect in his title, and delivered possession. The purchase money of the first sale was not paid, and the original vendor sued for the property, and recovered it; the court holding that the second vendee, though a bona fide purchaser, acquired no title as against him. *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; *Covill v. Hill*, 4 Denio (N. Y.) 323.

If, in this case, Falconer did not acquire title to the mare in controversy by purchase from Looney, or an agent authorized to dispose of her in payment of his debts, he was a mere custodian of her at the time he sold her to Tobey, and held her subject to the right of the special constable to take possession. He could have acquired no other right from A. P. Jetton in his official capacity; and, consequently, if this was all the claim he had, transferred no title by the sale to Tobey.

Another fact that defeats Tobey's right to the claims of a bona fide purchaser is, he purchased on a credit, and never paid the purchase money.

A. P. Jetton, as special constable, acquired a special property and right to the possession of the property when he seized under the order of attachment, and had the right to institute this action. He was liable to David B. Looney for her when the attachments were discharged, if Looney was then her owner, and, of course, was entitled to her possession for the purpose of discharging that obligation.

* * * Reversed.

III. Subject-Matter of Sale ⁵

HALL v. GLASS et al.

(Supreme Court of California, 1899. 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77.)

Commissioners' Decision. Action by Ernest E. Hall against Albert W. Glass and others. Judgment for plaintiff, and defendants Albert W. Glass and Jane Roe Glass appeal.

PRINGLE, C. Appeal from judgment, with bill of exceptions. Action brought to foreclose a chattel mortgage upon crops growing and to be grown. Mortgage made to secure the payment of a note for \$1,550, bearing date, January 24, 1895, payable one day after date, and also such other sums as the mortgagee might advance to the mortgagor during the continuance of the mortgage, provided that such advances shall be at the exclusive discretion and option of the mortgagee. The mortgage covers "all the crop and products of whatever nature which are now standing or growing, or which shall or may hereafter at any time be sown, planted, cut, or harvested by the said party of the first part during the continuance of this mortgage, on the following described lands and premises, and every part and portion thereof, to wit." Now follows description of two parcels of land, one owned by the mortgagor, A. W. Glass, and known as the "Glass Ranch," and the other held by him under lease. "This mortgage is intended to cover all the land farmed by the said A. W. Glass." The mortgagor covenants that "he will carefully tend, take care of, and protect the said crop while growing and until fit for harvesting, and then faithfully and without delay harvest, thresh, clean, and sack all the grain of every description raised upon said premises, and bale all the hay raised thereon in bales of approved and merchantable sizes, and put all the other products raised upon said premises in shape for market, and immediately deliver all said products into the possession of the party of the second part in the town of Pleasanton," etc.

A. W. Glass, the mortgagor, filed his petition in insolvency on October, 23, 1895, and was discharged from his debts on March 11, 1896. "Prior to the filing of the petition in insolvency, but subsequent to the making of note and mortgage," L. B. Glass made a declaration of homestead upon the Glass ranch, and the same was set apart as homestead by the insolvency court by order of December 7, 1895. A. W. Glass has always continued in possession of the Glass ranch. In the foreclosure proceedings a receiver was appointed to take possession and manage the crops of the year 1895; and another receiver

⁵ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 11½-13.

was appointed to take possession and manage the crops of 1896. A decree was entered in favor of the plaintiff, directing the receivers to apply the proceeds of the crops of those two years in their hands towards the payment of the amount found due to plaintiff. No other relief is granted. Appeal from the judgment is taken by A. W. Glass and L. B. Glass, who answered, as the wife of A. W. Glass. The defendant Veale, sued as sheriff of Contra Costa county, and appointed assignee in insolvency of A. W. Glass, does not appeal. There is no contest over the proceeds of the crop of the year 1895. The contention of the appellants is that the mortgage is not a lien upon the crop of 1896.

The first point made by the appellants is that the crops to be grown after 1895 are not designated with sufficient certainty to create a lien thereon, against the homestead right of the appellants or the insolvency of A. W. Glass. There is no serious contention that a chattel mortgage cannot cover crops unplanted. That point was directly decided in *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718. The contention is that the subject of the mortgage must be clearly defined, and that this mortgage does not define same with sufficient certainty, there being no defined limit to the continuance of the mortgage during which the lien is to continue. In support of this position, counsel cite several cases from Iowa and one from Nebraska. The leading case in Iowa is *Pennington v. Jones*, 57 Iowa, 37, 10 N. W. 274. The mortgage covered sundry acres of grain of different kinds, "to be sown and raised on the land leased of Barber McDowell, and now occupied by said W. A. McDowell (the mortgagor), lying and being in section 17," etc. The court held the mortgage invalid, because it did not state "that all the crops to be grown for any specified number of years were mortgaged," saying that "before a mortgage on crops to be sown or planted can be regarded as valid, as against third persons, the year or term the crops are to be grown must be stated." In *Muir v. Blake*, 57 Iowa, 622, 11 N. W. 621, the mortgage said: "All the crops raised by me in any part of Jones county for the term of three years." The court held that this was a "roving description, with nothing in the way of identification to suggest inquiry where the crops may be found except the body of the county." In *Eggert v. White*, 59 Iowa, 465, 13 N. W. 426: "All and the entire crop of flax and wheat and other grain or produce raised on the east half of. * * *" Held invalid, "because the year the same was to be grown is not stated." In *Cole v. Kerr*, 19 Neb. 554, 26 N. W. 598: "Seventy-five acres of corn to be planted, fifty acres of broom corn to be planted, tended, and delivered in June," etc. Held, that "to be planted" would apply to all corn "which might thereafter be found in Adams county." In all of these cases there are elements of uncertainty, either in the place or time of the planting. In the present case the description of the premises is specific. The alleged element of uncertainty is the term "during the continuance of the mortgage."

The appellants contend that the provision in the mortgage that it is intended to secure any future advances which mortgagee may make to mortgagor introduces an element of uncertainty, in this: That by such advances the mortgage may be kept alive indefinitely beyond the statutory time of the note. There is, however, under our decisions, a limit to the continuance of a mortgage as against subsequent purchasers or incumbrancers. In a line of cases in this court, beginning with *Lord v. Morris*, 18 Cal. 482, it has been well settled that subsequent purchasers or incumbrancers may rely upon the apparent expiration of the mortgage, and will hold against a prior mortgage in spite of an extension or renewal of the debt beyond its statutory life. By the same reasoning, subsequent advances, although contracted for by the mortgagor, cannot extend the apparent maturity of the mortgage against subsequent purchasers. This rule, in reference to future advances, as laid down in the cases, is a limit to the life of a mortgage. It is said in *Tapia v. Demartini*, 77 Cal. 387, 19 Pac. 641, 11 Am. St. Rep. 288, that, where a mortgage is given to secure future advances, the mortgagee cannot safely make such advances where he has actual notice of a sale or incumbrance made by the mortgagor. And in *Jones, Chat. Mortg.* (3d Ed.) § 97, it is said: "The general rule is that a prior mortgagee is affected only by actual notice of a subsequent incumbrance, and not by constructive notice; but there are numerous authorities which hold that if the mortgagee has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any incumbrance which has been duly recorded at the time the advance is made, whether the mortgagee has actual notice of it or not."

In view of these authorities, the term "during the continuance of this mortgage" has a defined meaning. It cannot be said, as claimed by the appellants, that the mortgage could be continued *ad infinitum*. In any event, the mortgage is good to the extent of the crops planted during the life of the note. The uncertainty of description insisted upon by appellants is in the doubtful period beyond the life of the note. There can be no question that the mortgage may be good to the extent of what is certain and definite, even if it be bad for the rest. In one of the cases cited by the appellants (*Luce v. Moorehead*, 73 Iowa, 499, 35 N. W. 598 [5 Am. St. Rep. 695]), it was said: "An instrument may be valid as to the property sufficiently described, and void for the uncertainty of the description of other property." This view of the present case is sufficient to sustain the ruling of the court below, which extends only to the crops of the first two years.

Another contention of the appellants is that, the proceedings in insolvency having been instituted in 1895, there was then no lien upon the crops of 1896 which were then unplanted, and, the debt being discharged by the insolvency, there was no debt to sustain any lien to arise thereafter when the crop began to have an existence. They cite

the case of *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522, to the effect that the lien actually attaches only when the property comes into existence. But the case recognizes the equitable lien attaching to the potential existence, by virtue of which the mortgage of an unplanted crop is valid. The case holds that this equitable mortgage was superior to a subsequent mortgage made after the crop was planted. And our case of *Arques v. Wasson*, *supra*, rests upon the same ground,—that there is in such cases a potential existence which sustains the lien of the mortgage. After this lien is created, insolvency proceedings cannot affect the debt to the impairment of the lien. In *Arques v. Wasson* this lien prevailed against an attachment and execution. In *Mayer v. Taylor* it prevailed against a mortgage made after the crop was planted. Certainly, proceedings in insolvency have no stronger legal or equitable force than purchasers for valuable consideration.

But, say the appellants, this is a contract for continuing personal services; and they cite the case of *Mooney v. Detrick*, 85 Cal. 549, 22 Pac. 1111, 26 Pac. 280, which holds that the debt due by one who engages the time and services of another is discharged by the insolvency. Conceding, without deciding, that the converse of this is sound,—that a covenantor is released from his contract for service by insolvency,—yet the personal services in this case are not the debt or of the essence of the debt. The covenant of this mortgage that the mortgagor should tend, protect, and take care of the crop, and deliver it to the mortgagee, is merely collateral to the real indebtedness, and for the better enforcement of the lien. By virtue of the debt and the lien, the mortgagee is entitled to hold all the crops grown and tended by the mortgagor; and the mortgagor covenants to tend and protect the crops, and deliver them to the mortgagee. That his services in that respect are not the debt which the mortgage secures, nor of the essence of the debt, is made clear by the fact that provision is made in the mortgage that, in case of his breach of this covenant, the mortgagee might enter upon the premises, and take all measures necessary for the protection of the crops and products, and expressly appointing the mortgagee the attorney of the mortgagor for that purpose. The covenants in that respect are very significant: "And the party of the first part does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that he and they will carefully tend, take care of * * *; that, in default of any or either of the above acts to be done by the said party of the first part, the party of the second part, his successors or assigns, may enter into or upon the said premises, and take all measures necessary for the protection of said crops or products or his interest therein, etc. * * * And the said party of the first part does, for the purpose aforesaid, make, constitute, and appoint the said party of the second part, or his successors or assigns, his true and lawful attorney irrevocable, with full power to enter upon said premises and take possession of said crops and take care of, protect, thresh, clean, and

sack or bale the same in case of any default on the part of the covenants herein contained." It would be unreasonable to hold that a release of the mortgagor from these subsidiary services would destroy the lien which is so carefully guarded against any injury to arise from the absence of the subsidiary services. And the case is stronger, if possible, against an insolvent who himself institutes proceedings to disqualify himself.

Substantially the same argument is urged by appellants in reference to the declaration of homestead made after the mortgage, and before the crop of 1896 was planted. But the argument has no greater force in favor of a homestead right than in favor of a sale for value or proceeding in insolvency. Establish the fact that there is sufficient potential existence in the coming crops to sustain a legal or equitable lien upon them, and the lien must prevail against subsequent purchasers of every kind; otherwise, it is no lien at all. The objection made in all the cases to the descriptions is that they are not sufficient to impart notice. In one of the cases cited by appellants the certainty of description required is said to be "sufficient if it be such as to enable third parties, by inquiries, which the instrument itself indicates and directs, to identify the property covered by it." *Muir v. Blake*, 57 Iowa, 665, 11 N. W. 623. As the alleged element of uncertainty in this case was the continuance of the mortgage, the fact that it was in force in 1895 and 1896 was within the knowledge of one homestead claimant, and easily ascertained by the other.

Appellants insist that there is error in not making a specific finding that L. B. Glass is the wife of A. W. Glass. But her rights were protected. She was a party to the action. She answered as the wife, declaring herself to be his wife. It is found that she made a declaration of homestead upon his property; and she set up in her answer the homestead which she had declared upon the land of her husband. Under these circumstances, the absence of a special finding has done her no harm.

Criticism is made of the form of the decree, the point of objection being that it contains the usual clause that the defendants and those claiming under them are barred and foreclosed of all equity of redemption in or claim to "the mortgaged property," but that no sale of property is ordered. The operative words of the decree are that the moneys which have come into the hands of the receivers from the sales of the crops of 1895 and 1896 be applied towards the payment of the ascertained debt. These sales appear to have been made by the receivers under orders of court presumably correct, as no objection to them appears in the records. The clause by which the defendants are barred and foreclosed of any right of redemption "in the mortgaged property" cannot be appropriately applied to any future crops not sold or ordered to be sold, but may properly be referred to what have been sold by the receivers, and the proceeds of which are ordered to be applied towards the payment of the debt. The respondent, in his

points and authorities, declares that he "is satisfied with the decree"; and, as there is nothing in the decree reserving any right to further proceedings in the action, the jurisdiction is exhausted, and the clause in question, if error, is not prejudicial. I advise that the judgment be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

GRANTHAM v. HAWLEY.

(Court of King's Bench, 1619. Hobart, 132.)

Robert Grantham brought an action of debt upon an obligation of forty pounds against Edward Hawley, the condition whereof was, that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it twenty pounds. Now the case upon the pleading and demurrer fell out thus; that one Sutton was seised of the land, and 30 Eliz. in April, made a lease of it to Richard Sankee for twenty-one years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take and carry away, to his own use, such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff; and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by Hutton for the plaintiff, that it was merely contingent whether there should be corn growing upon the ground at the end of the term, or not. Also, the lessor never had property in the corn; and therefore could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues with the land to the lessor; and it was said to be adjudged. And it was agreed by the court that if A., seised of land, sow it with corn, and then convey it away to B. for life, remainder to C. for life, and then B. die before the corn reapt; now C. shall have it, and not the executors of B., though his estate was uncertain.

Note, the reason of industry and charge in B. fails; yet judgment in this case was given against the plaintiff, that is, that the property and very right of the corn, when it happened, was past away; for it was both a covenant and a grant. And therefore if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now though corn be *fructus industrialis*, so that he that sows it may seem to have a kind of property, *ipso facto*, in it, divided from the land; and therefore the executor shall have it, and not the heirs; yet in this case, all the colour that the plaintiff hath to it, is by the

land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after and the property shall pass as soon as the fruits are extant, as 21 H. 6. A parson may grant all the tithe wool that he shall have in such a year; yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property; for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not *ex vi termini*, gives the trees.

HOLROYD v. MARSHALL.

(House of Lords, 1862. 10 H. L. Cas. 191.)

James Taylor carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for £5,000. An indenture, dated the 20th of September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for £5,000, but could not then pay the purchase money, wherefore it was agreed, &c., that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises') were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of £5,000, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of £5,000, contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisos, and

declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, &c., will at all times, during such continuance as aforesaid, at the request, &c., of the said Holroyds, their executors, &c., do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the £5,000 and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of scire facias against Taylor for the sum of £155. 18s. 4d., damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for £138. 3s. 3d., was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice Chancellor Stuart, who on the 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the vice chancellor's order was reversed. This present appeal was then brought.

Mr. Malins and G. V. Yool, for appellants. Mr. Amphlett and Mr. Hobhouse, for respondents.

Lord Chancellor WESTBURY,⁶ after stating the facts of the case, said:

My lords, the question is whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally com-

⁶ Parts of the opinions the Lord Chancellor and Lord Chelmsford are omitted.

prised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interests in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and

fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

Some use was made at the bar and in the court below of the language attributed to Mr. Baron Parke in the case of *Mogg v. Baker*, 3 Mees. & W. 198. That learned judge appears to have given, not his own opinion, but what he understood would have been the decision of a court of equity upon the case. He is represented as speaking upon the authority of one of the judges of the court of chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Mr. Baron Parke, speaking of the agreement in the case, says, "It would cover no specific

furniture, and would confer no right in equity." I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in *Mogg v. Baker* related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in *Mogg v. Baker* is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

LORD CHELMSFORD. My lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this house, but that he was supported in it by my noble and learned friend, Lord WENSLEYDALE, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned lord upon the wool sack, before whom the last argument took place. His great learning and long experience in courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was ten-

ant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His lordship here stated the bill of sale and the other facts of the case.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void. *Robinson v. Macdonnell*, 5 Maule & S. 228. But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio procedens* in the words of the maxim; and although Chief Justice Tindal, in the case of *Lunn v. Thornton*, 1 C. B. 379, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of *Congreve v. Evetts*, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects

as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope v. Hayley*, 5 El. & Bl. 830, 845 (a case much relied upon by the vice chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in *Mogg v. Baker*, 3 Mees. & W. 195, 198, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the

furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon in the case of *The Warre*, 8 Price, 269, n. in support of it. It must also be observed, that the proposition in *Mogg v. Baker* hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell, resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest made subsequently bona fide acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law, property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it. * * *

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, was not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose? The trustee could not take possession of the new machinery, for that would have been contrary to the provisions

of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

LORD WENSLEYDALE. My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary. No possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagee's right, appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon.

It is true that Lord Cottenham, in the case of *Metcalf v. Archbishop of York*, 1 Mylne & C. 547, 555, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, at the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favour of the judgment creditor. If Lord Cottenham really meant to say that notice, by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict. c. 36. It was argued that this act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the legislature, but there is no ground for excluding them from the provisions of the act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late lord chancellor was right in holding that, if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the vice chancellor affirmed. * * *

Reversed.

FORMATION OF CONTRACT—UNDER THE STATUTE OF FRAUDS

I. What Contracts are Within the Statute ¹

1. CONTRACTS FOR WORK, LABOR, AND MATERIALS

LEE v. GRIFFIN.

(Court of Queens Bench, 1861. 1 Best & S. 272.)

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labour done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea. That the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21. for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the Sittings for Middlesex after Michaelmas Term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:

“My Dear Sir: I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, &c. Frances P.”

Shortly after writing the above letter, Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, and the learned judge was of that opinion. The plaintiff's counsel then contended that, on the authority of *Clay v. Yates*, 1 H. & N. 73, the plaintiff could recover in the action on the count for work and labour done and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

CROMPTON, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial.

¹ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 18-20.

There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of showing what document is referred to. Assuming in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labour. *Clay v. Yates*, 1 H. & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labour, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labour or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in *Clay v. Yates*, 1 H. & N. 73, is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labour. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labour. *Atkinson v. Bell*, 8 B. & C. 277 (E. C. L. R. vol. 15), is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J., in *Grafton v. Armitage*, 2 C. B. 339 (E. C. L. R. vol. 52), where he says: "In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon

materials that are the property of the plaintiff." And Tindal, C. J., in his judgment in the same case, p. 340, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of *Atkinson v. Bell* is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted; no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labour. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In *Atkinson v. Bell*, 8 B. & C. 277 (E. C. L. R. vol. 15), the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton v. Armitage*, 2 C. B. 340 (E. C. L. R. vol. 52), Tindal, C. J., lays down this very principle. He draws a distinction between the cases of *Atkinson v. Bell* and that before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of *Clay v. Yates*, 1 H. & N. 73, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work

of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Rule absolute.

BAGBY v. WALKER.

(Court of Appeals of Maryland, 1893. 78 Md. 239, 27 Atl. 1033.)

Two actions—one by Arthur M. Walker and James R. Myers, trading as Walker & Myers, against Charles T. Bagby and Arthur D. Rivers, trading as Bagby & Rivers; the other by Bagby & Rivers against Walker & Myers. Judgment for Walker & Myers. Bagby & Rivers appeal.

McSHERRY, J. The only questions involved in the two cases now before us arise on the single exception reserved to the rulings of the superior court of Baltimore on several prayers for instructions to the jury. There were two actions between the same parties, tried at the same time in the court below. In one, Walker & Myers, the appellees here, were plaintiffs, and the appellants were defendants; in the other, Bagby & Rivers, the appellants here, were plaintiffs, and the appellees were defendants. In the first, Walker & Myers sued to recover the balance due upon the contract price of certain lumber sold and delivered by them to Bagby & Rivers, and also to recover the difference between the contract price and the market price of certain other lumber subsequently ordered, but which Bagby & Rivers refused to accept. A judgment was entered in favor of the plaintiffs. In the second case, Bagby & Rivers sued to recover damages for a failure on the part of Walker & Myers to deliver the kind and quality of lumber stipulated for, and also for a failure to deliver within the time designated in the agreement a large part of the lumber sold by them to Bagby & Rivers. A judgment of non pros. was entered in the case.

The contract is embodied in a letter from Bagby & Rivers to Walker & Myers under date of January 29, 1891, and a written acceptance of the terms by Walker & Myers on the same date. The time limited for filling the order was three months. The first delivery under this written contract, about the execution of which there is no dispute, was made in the following March, and the last on November 27th of the same year, long after the expiration of the three-months limit. The price of the lumber actually delivered amounted to \$1,635.38, and the payments made thereon, beginning in April and ending in August, aggregated \$1,137.98, leaving an unpaid balance of \$497.70. There was evidence in the case tending to prove that Bagby & Rivers had waived the requirement of time mentioned in the letter of January 29, 1891, as to the delivery of the lumber. Walker & Myers offered other

evidence, tending to prove that in the latter part of November they, at the request and upon a verbal order of Bagby & Rivers, cut and shipped to Baltimore other lumber, in addition to that specified in the contract, at a price agreed upon between them, which lumber they offered to Bagby & Rivers in two lots in January and March, 1892, but that Bagby & Rivers refused to receive it, and that Walker & Myers lost by those refusals \$179.20, that sum being the difference between the price agreed upon and the market price when the deliveries were tendered. Bagby & Rivers denied giving the order for this additional lumber. The lumber was cut by Walker & Myers at their mills in North Carolina for the purpose of filling these two orders, and was transported to Baltimore, where it was unloaded on the wharves of Walker & Myers, from whence all of it, except the two lots which Bagby & Rivers refused to take, was hauled by Bagby & Rivers, after being inspected by them, to their furniture factory.

Upon these facts the court instructed the jury at the instance of Walker & Myers that, notwithstanding the mention in the letter of January, 1891, of the period of three months as the limit within which the lumber was to be furnished, still, if the jury should find that Bagby & Rivers waived that requirement, and accepted and hauled lumber from the plaintiffs' wharves until November 27, 1891, then the defendants would not be entitled to recoup against the plaintiffs' claim any damages sustained by the defendants by reason of the failure of the plaintiffs to deliver the lumber within the time stipulated. Further, that if the defendants ordered other lumber, that the plaintiffs cut it upon that order, and offered it to the defendants at the usual place of delivery; that it was of the quality ordered; and that the defendants refused to take it, and pay for it,—then the plaintiffs would be entitled to recover damages for that refusal. This was Walker & Myers' third prayer. And, finally, that under the last preceding instruction the measure of damages would be the difference between the price agreed upon and the market price in Baltimore at the dates when the lumber should have been accepted.

Mere acceptance of the lumber after the expiration of the time fixed in the agreement for its delivery was not of itself a waiver of the breach committed by the failure to deliver it according to the terms of the contract; nor did such an acceptance preclude the vendees from subsequently suing to recover the damages resulting to them by reason of the nondelivery from the time of default up to the date of acceptance; nor from recouping, when sued by the vendors, those damages against the latter's claim for the purchase money. *Central Trust Co. v. Arctic Ice Mach. Manuf'g Co.*, 77 Md. 202, 26 Atl. 493. The instruction does not question these principles. It does not proceed upon the theory that acceptance after a refusal to deliver within the stipulated time is of itself, without more, equivalent to a waiver of the time for delivery, but distinctly leaves to the jury to find from the evidence

in the case whether, as an independent fact, Bagby & Rivers waived the requirement that the lumber should be furnished within three months. If they did waive that requirement, they could not subsequently found an action upon its nonperformance, nor rely thereon by way of recoupment. If they condoned the breach, they cannot afterwards base a claim for damages upon it. There was evidence before the jury to the effect that Bagby & Rivers had waived the requirement of time mentioned in the letter of January 29, 1891, and no special exception was taken to the prayer upon the ground that there was no evidence in the cause to support it. It is a mistake to suppose that the prayer is founded upon the assumption that a mere acceptance of the lumber was tantamount to a waiver of the time for delivery, and there is nothing in the structure of the prayer at all calculated to mislead the jury to such a conclusion. There was, in our opinion, no error committed by the granting of it.

The two remaining instructions given at the instance of Walker & Myers relate to the lumber which Bagby & Rivers refused to receive. There were three objections suggested to the first of these two instructions, which is the third prayer of Walker & Myers; and these are: First, that the instruction makes reference to the facts stated in an antecedent prayer, which was rejected, and which was consequently not before the jury; second, that the contract upon which it permits a recovery is void under the seventeenth section of the statute of frauds; and, third, that, no time having been named in the verbal contract for the delivery of lumber under it, a reasonable time was implied by law, and the finding of what was a reasonable time should have been left to the jury.

The first objection is not a substantial one. A reference to the facts stated in the rejected prayer was wholly superfluous. Eliminating that reference altogether in no way affected the integrity of the instruction. Its remaining in the instruction could not possibly have misled or confused the jury, and obviously did not prejudice or injure the appellants.

The second objection, though more plausible, is not more tenable. While the seventeenth section of the statute of frauds (29 Car. II., c. 3) declares all contracts for the sale of goods, wares, and merchandise for the price of £10 and upwards to be invalid unless part of the goods be accepted, or part of the price be paid, or something be given in earnest to bind the bargain, or some note or memorandum in writing be signed by the party to be charged, still from a very early period it has been the settled law of Maryland, where the Statute of Charles has always been in force, that when work and labor are to be bestowed by the vendor upon the article sold before it is to be delivered the contract is not within the statute, (*Eichelberger v. McCauley*, 5 Har. & J. 213, 9 Am. Dec. 514; *Rentch v. Long*, 27 Md. 188;) and the reason is that when work and labor are necessary to prepare an article for delivery the work and labor to be done by the vendor form part of the

consideration of the contract, and, as these are not within the statute, the sale is not a sale of goods, wares, and merchandise, within the meaning of the seventeenth section of 29 Car. 11., c. 3. Now, the proof shows that when the alleged verbal order was given shortly after November 29, 1891, for this additional lumber, it was necessary for Walker & Myers to have the lumber cut or prepared for delivery,—to put it in a condition different from that in which it was at the time the contract was made. This circumstance took the contract out of the operation of the statute.

The third objection to the instruction is, though narrow, substantial and fatal. No time was fixed in the alleged verbal contract of November, 1891, for the delivery of the lumber under it. The law in all such instances prescribes a reasonable time, (*Kriete v. Myer*, 61 Md. 558;) and it is for the jury, under all the circumstances of the case, to determine what is a reasonable time, (*Buddle v. Green*, 3 Hurl. & N. 906; *Bryam v. Gordon*, 11 Mich. 531; *Pinney v. Railroad Co.*, 19 Minn. 251 [Gil. 211;] *Stange v. Wilson*, 17 Mich. 342; *Kriete v. Myer*, 61 Md. 558.) But this instruction submitted no such question to the jury. The proof showed that Walker & Myers tendered delivery of this lumber in two lots,—one on January 2d, and the other on March 22, 1892; but whether these were within a reasonable time, under all the circumstances of the case, was not only not left to the jury to determine, but was in effect decided by the court. The instruction assumed that the offers to deliver were made within a reasonable time, for it left to the jury to find that the order for the lumber was given; that the lumber was cut; that it was offered to Bagby & Rivers at the usual place of delivery; that its quality was such as had been specified, and that the defendants refused to accept it; and then instructed them that upon the finding of these facts the plaintiffs were entitled to recover. But the time when the offer to deliver was made, which was a necessary element of the plaintiff's case, was entirely ignored. Whether the offer had been made within a reasonable time or not was exclusively for the jury to say, but it was not submitted to them. The instruction, by directing a verdict for the plaintiffs upon the finding of the facts above stated, necessarily assumed that the offers to deliver had been made within a reasonable time, because, unless the offers to deliver had been made within a reasonable time, the plaintiffs had no right to recover at all. But it was not within the province of the court to assume or to decide that question, and, as a consequence, the instruction in which that was done was erroneous.

The remaining prayer granted upon the request of Walker & Myers relates to the measure of damages for the refusal of Bagby & Rivers to receive the lumber offered to them in January and March, 1892, and correctly states the law on that subject. *Pinckney v. Dambmann*, 72 Md. 183, 19 Atl. 450. But, inasmuch as this instruction was dependent upon and a mere corollary from the preceding erroneous instruction,

though correct as an abstract proposition, there was error in granting it. Had the previous instruction been right, this one would have been properly given.

The superior court rejected the first and fourth prayers presented by Bagby & Rivers, and these prayers raise the only other questions open for review. The fourth prayer was very properly abandoned in the argument, and we need therefore give to it no consideration. The first prayer of Bagby & Rivers asked the court to say to the jury that if they should find that Bagby & Rivers were induced to receive the lumber by false representations knowingly made by Walker & Myers as to its quality and condition, then Bagby & Rivers would not be bound by any inspection made by them of the lumber. We need only say, in disposing of this prayer, that there is no evidence in the record to show that Walker & Myers knowingly made any false representations as to the quality and condition of the lumber, and that, therefore, it would have been improper to allow the jury to speculate upon that subject, as they must have done had this prayer been granted.

It follows from the views we have expressed that there was no error committed by the court in its rulings in the case of Bagby & Rivers against Walker & Myers, and its judgment of non pros. in that case will be affirmed. It also follows that, as there was error committed in granting the third and fourth prayers presented by Walker & Myers, the judgment in the case of Walker & Myers against Bagby & Rivers must be reversed, and a new trial will be awarded.

Judgment in No. 35 reversed, with costs above and below, and new trial awarded. Judgment in No. 36 affirmed, with costs above and below.

HEINTZ v. BURKHARD.

(Supreme Court of Oregon, 1896. 29 Or. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777.)

Action by A. R. Heintz & Co. against Joseph Burkhard. From a judgment of nonsuit, plaintiffs appeal.

BEAN, C. J. This action was brought to recover damages for the breach of a contract to furnish the ironwork for defendant's building, and comes here on an appeal from a judgment of nonsuit. For the purposes of this appeal, it is sufficient to say that the evidence tended to show that in August, 1894, the plaintiff and defendant entered into an oral contract, by the terms of which the plaintiff was to manufacture, and furnish to the defendant, the ironwork for a brick building about to be erected by him, according to certain plans and specifications, for the sum of \$2,825, but that defendant subsequently, and before any work was performed, wrongfully refused to allow plaintiff to proceed with the execution of its contract. The ironwork referred to

was not to be of the kind manufactured by the plaintiff in the usual course of business, or for the trade, but of special designs and measurements, suitable only for use in the construction of defendant's building. The court below ruled that the contract was "an agreement for the sale of personal property," within the meaning of subdivision 5, § 785, of Hill's Annotated Laws, and void because not in writing, and this ruling presents the only question to be determined on this appeal.

To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property, to be executed in the future, and when for work and labor and material only. If the former, it is within the statute. If the latter, it is not. Thus far the authorities, except in the state of New York, are substantially agreed; but there have been numerous decisions, and much diversity and even conflict of opinion, in relation to a proper rule by which to determine whether a contract is in fact for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute.

There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested the rule seems to have been settled in *Lee v. Griffin*, 1 Best & S. 272, that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case the action was brought by a dentist to recover £21. for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand alone, and is in direct conflict with the previous decisions of the English courts. *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burrows, 2101; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 Term R. 14; *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & C. 574. It is said to have been the result of Lord Tenterden's act, which expressly extended the statute to all contracts of sale, notwithstanding the goods "may not at the time of such contract be actually made, pro-

cured or produced or fit or ready for delivery, or some act may be required for the making or completing thereof to render the same fit for delivery." *Meincke v. Falk*, 55 Wis. 432, 13 N. W. 545, 42 Am. Rep. 722; *Benj. Sales* (6th Ed.) 108.

In this condition of the English authorities, we are not prepared to go to the full extent of *Lee v. Griffin*. It is an extreme case, and, unless the decision was made to conform to Lord Tenterden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which theoretically the statute seeks to prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property," within the meaning of the statute, is certainly giving it the widest possible operation, and has not found general recognition in this country, as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges.

In New York the rule prevails that a contract concerning personal property not existing in solido at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute. *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Higgins v. Murray*, 73 N. Y. 252. But this rule seems to be peculiar to that state.

By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for the trade, or as the result of a special order, and for special purposes. If the former, it is regarded as a contract of sale, and within the statute. If the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute (*Mixer v. Howarth*, 21 Pick. [Mass.] 205, 32 Am. Dec. 256) but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale, to which the statute applies. *Gardner v. Joy*, 9 Metc. (Mass.) 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the

goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Ames, J., in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. And this doctrine seems to be the one most widely adopted in this country.

As to the latter part of the rule, relating to goods made on special orders, there is little if any conflict in the American cases. *Baker, Sales*, § 96; 2 *Schouler, Pers. Prop.* § 443; *Brown, St. Frauds*, § 308; 8 *Am. & Eng. Enc. Law*, 707; note to *Flynn v. Dougherty*, 14 L. R. A. 230 (Cal.) 27 Pac. 1080; *Meincke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Finney v. Apgar*, 31 N. J. Law, 266; *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743; *Hight v. Ripley*, 19 Me. 137; *Cason v. Cheely*, 6 Ga. 554; *Abbott v. Gilchrist*, 38 Me. 260. Until legislation shall assert itself more positively, the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of *Lee v. Griffin*; and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject-matter of the contract did not exist in solido, or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade.

It follows that under either view the court below was in error in holding that the contract was void because not in writing. The judgment must therefore be reversed, and a new trial ordered.

2. CONTRACT FOR RESALE

JOHNSTON v. TRASK.

(Court of Appeals of New York, 1889. 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 391.)

Appeal from a judgment of the general term of the third department, entered on a verdict directed at circuit in favor of the plaintiff. Since January, 1882, the defendants have been bankers and brokers, doing business as partners under a firm name. On the

trial of the issues, the plaintiff testified that on the 18th day of January, 1882, the managing partner of the firm, at its place of business, orally agreed with the plaintiff to purchase for him, if they could be bought in the market, income mortgage bonds of the Ohio Central Railroad of the par value of \$10,000, "and, any time you want to get rid of them, we will take them off your hands at what they cost you." Later in the day, the defendants reported to the plaintiff that they had purchased the bonds for \$4,800, and that their commissions were \$12.50; and thereupon the plaintiff paid \$1,000 towards the purchase price. The bonds were retained by the defendants as security for the sums due from the plaintiff to them until November 16, 1882, when the plaintiff paid the full purchase price for the bonds, commissions, and interest, and took them into his possession. The market price of the bonds declined until April 28, 1884, when they were selling for about 10 cents on a dollar. On this date the plaintiff tendered the bonds to the defendants, and demanded that they pay him \$4,812.50, which they refused to do; and April 30, 1884, this action was brought, on contract, to recover that sum. The defendants did not contradict the plaintiff's evidence, which was corroborated by three witnesses; but at the close of his case they moved for a nonsuit on the grounds—First. That the oral contract was void for not complying with the following section of the statute of frauds: "Sec. 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall, at the time, pay some part of the purchase money." Second. That the evidence was insufficient to sustain the conclusion that the managing partner had authority to bind the firm by such a contract. Third. That the plaintiff did not tender the bonds, and demand the repayment of the price, within a reasonable time, and thereby lost his right of action. The motion was denied, and, the defendant not asking to have any question submitted to the jury, a verdict was directed in favor of the plaintiff for \$4,800, with interest thereon from April 28, 1884. A judgment was entered on the verdict, which was affirmed by the general term.²

FOLLETT, C. J., (after stating the facts as above.) An oral contract by which a person sells his own chattels or choses in action for more than \$50, payment and delivery being made, and agrees to take them back from, and repay the purchase price to, the purchaser on demand, is an entire contract; and the promise to take back the property, and repay the purchase price, is not void by the third section of the statute of frauds. *Wooster v. Sage*, 67 N. Y. 67; *Fitz-*

² See 40 Hun, 415.

patrick v. Woodruff, 96 N. Y. 561; White v. Knapp, 47 Barb. 549; Williams v. Burgess, 10 Adol. & E. 499; Fay v. Wheeler, 44 Vt. 292; Dickinson v. Dickinson, 29 Conn. 600; 1 Benj. Sales, (Corbin's Ed.) § 169. Executed contracts of sale, embracing a promise by vendors of chattels that in case they do not suit the purchaser, or do not possess certain specified qualities, the vendor will repay to the vendee the purchase price upon their return, have been frequently considered by the courts, (Towers v. Barrett, 1 Term R. 133; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595) but no case has been cited holding that such a promise on the part of a vendor is an independent contract. When an agent, by an oral contract, sells and delivers the goods of a disclosed principal, his personal oral warranty of quality is not a contract independent of the contract of sale, but is a part of it, and one consideration is sufficient to support the sale and warranty. The oral contract of the defendants that they would purchase for the plaintiff in the market, at market rates, the bonds, for the usual compensation, and in case he should thereafter become dissatisfied with the bonds, that they would, on demand, take them off his hands at what they cost him, was a single contract. Under this contract, the bonds were purchased and held by the defendants until the purchase price and their commissions were paid, and then they delivered the bonds to the plaintiff. The promise of the defendants that they would take the bonds off the plaintiff's hands at what they cost him, upon request, is not a contract for the sale of goods, chattels, or things in action, within the third section of the statute of frauds, but is a provision for the rescission of the entire contract, and is valid.

The learned counsel for the appellant, in support of his contention, cites Hagar v. King, 38 Barb. 200. In that case a firm was indebted to the plaintiffs in the action for work performed in constructing part of a railroad. The defendant, who was one of the firm, asked the plaintiffs to take from the railroad corporation its bonds in payment of the debt, orally agreeing with the plaintiffs, for himself, that, if they would so take the bonds, he (not the firm) would, within 10 days, take the bonds from and pay to the plaintiffs the amount of the firm's debt. The plaintiffs assented to the proposal. Afterwards they accepted from the corporation its due-bill for the amount due them for their work, payable in the bonds of the corporation, and gave a receipt for all of their demands for work done on the road. The plaintiffs then indorsed the due-bill, delivered it to the corporation, and received the bonds. Within 10 days the plaintiffs tendered the bonds to the defendant, and demanded the amount for which they were taken in payment. It was held that the oral agreement embraced two contracts,—one to accept the bonds in payment of the debt, and another to purchase the bonds at a future day at a given price,—and that the latter contract was within the third section of the statute of frauds, and void. That case is easily

distinguishable from the one at bar. The defendant in that case, as an individual, was not indebted to the plaintiffs and his individual contract to take back the bonds was held to be distinct from the contract by which the firm's debt was paid in the manner described.

Was the evidence sufficient to sustain the conclusion that the managing partner was authorized to make the contract in behalf of the firm? The defendants admitted, in their answer, that they were bankers and brokers, and that they entered into that part of the contract by which they agreed to purchase the bonds for the plaintiff, which, by their concession, was within the ordinary business of the firm. But they neither averred in their answer, nor gave evidence tending to show, that the promise to take back the bonds was beyond the scope of their business. There being no evidence which shows that the transaction was actually beyond the scope of the business of the firm, the question arises whether it was apparently beyond the scope of its business. *Bank v. Underhill*, 102 N. Y. 336, 7 N. E. 293. The case shows that, in addition to the business usually done by bankers and brokers, the defendants were accustomed to purchase and carry securities on margins for their customers. The undisputed evidence is that the managing partner did make the promise upon which the plaintiff recovered; thus asserting his authority to make it in the name and in behalf of the firm. No evidence is found in the record which would justify the court in holding, as a matter of law, that the promise upon which the action was brought was so far beyond the scope of the business of the firm that the plaintiff had no right to rely upon it. The evidence was sufficient to cast upon the defendants the burden of rebutting the presumption arising from the evidence and the pleadings, and, they having failed to do this, no error was committed in refusing to nonsuit on the ground that the managing partner had no authority to bind the firm by this contract.

The third ground upon which a nonsuit was asked for is not supported by the evidence. The undisputed evidence is that the managing partner of the firm, on several occasions, advised the plaintiff not to part with the bonds, assured him that they were good, and would ultimately advance in the market. Under these circumstances the plaintiff was not guilty of laches in not earlier returning the bonds, and demanding the price paid. *Wooster v. Sage*, *supra*. The judgment should be affirmed, with costs. All concur.

II. What Are Goods, Wares and Merchandise ³

1. INCORPOREAL PROPERTY

GREENWOOD v. LAW.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688.)

Action by George Law against Francis Greenwood to recover damages for the refusal of defendant to execute a parol agreement to assign a mortgage to plaintiff. A motion to nonsuit plaintiff was denied, and defendant brings error.

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this state for the sum of \$3,700. Law alleged that Greenwood entered into a parol agreement with him to assign him this mortgage for the sum of \$3,000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement. On the trial below a motion was made to nonsuit the plaintiff on the ground that the alleged agreement was within the statute of frauds. The refusal of the trial court to grant this motion is assigned for error.

Lord Chief Justice Denman, in *Humble v. Mitchell*, reported in 11 Adol. & E. 205, and decided in 1840, said that no case directly in point on this subject had been found, and he held that shares in an incorporated company were not goods, wares, and merchandise, within the seventeenth section of the statute of frauds. He overlooked the cases of *Mussell v. Cooke*, reported in Finch, Prec. 533, (decided in 1720,) and *Crull v. Dodson*, reported in 2 Eq. Cas. Abr. 51, c. 28, Sel. Cas. Ch. 41, (decided in 1725,) in which the contrary view was taken. In the case of *Pickering v. Appleby, Comyn*, 354, this question was fully argued before the 12 judges, who were equally divided upon it. The cases decided in the English courts since 1840 have followed *Humble v. Mitchell*. They will be found collected in *Benj. Sales* (Ed. 1888,) in a note on page 106.

In this country a different rule prevails in most of the states. In *Baldwin v. Williams*, 3 Metc. (Mass.) 365, a parol contract for the sale of a promissory note was held to be within the statute. In Connecticut and Maine a contract for the sale of shares in a joint-stock company is required to be in writing. *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430. Chief Justice Shaw, after a full discussion of the subject in *Tisdale v. Harris*, 20 Pick. (Mass.) 9, concludes that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise

³ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 21-22.

within the statute of frauds, and, in the absence of the other requisites of the statute, must be proved by some note or memorandum in writing, signed by the party to be charged or his agent. He did not regard the argument that by necessary implication the statute applies only to goods of which part may be delivered as worthy of much consideration. An animal is not susceptible of part delivery, yet undoubtedly the sale of a horse by parol is within the statute. The exception in the statute is when part is delivered; but, if there cannot be a delivery in part, the exception cannot exist to take the case out of the general prohibition.

Bonds and mortgages were expressly held to be goods and chattels in *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 53. That was an action of trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which, upon sound legal principles, such securities are goods and chattels. This sense ought to be applied to these words in this case. Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property. The words, "goods, wares, and merchandise," in the sixth section of the statute, are equivalent to the term "personal property," and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section. In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit.

2. INTEREST IN LAND—FOURTH SECTION OF THE STATUTE

STUART v. PENNIS.

(Supreme Court of Appeals of Virginia, 1895. 91 Va. 688, 22 S. E. 509.)

RIELY, J. This was a suit in equity to compel the specific performance of a contract in writing for the sale of growing timber trees. Upon a demurrer to the bill, it was dismissed by the court.

There was, and could be, no objection urged against the relief sought, growing out of any indefiniteness as to the terms of the contract, or as to its subject-matter. The defense of the appellee was that the subject of the contract was personal property, and not an interest in real estate; and being personal property, and there also being an adequate remedy at law for the breach of the contract, a court of equity

would not specifically enforce it. On the other hand, counsel for the appellant claimed that standing trees so pertain to the soil that a contract for their sale is, in law, a sale of an interest in land, and that under the general rule that a court of equity will always enforce, in a proper case, the specific performance of a contract for the sale of land (2 Minor, Inst. 867; Pom. Spec. Perf. § 10), such relief should have been granted in this case.

We have been cited by counsel to no decision of this court on this subject, and are ourselves aware of none. Our attention was called to the case of *McCoy v. Herbert*, 36 Va. (9 Leigh) 548, 33 Am. Dec. 256, but an examination of it shows that the question in controversy here was not there raised or decided. The sole question there was as to the validity of an assignment of a contract of sale of certain trees standing in the woods, which had been bought for ship timber, and not whether the subject of the contract was an interest in land or chattels. There is scarcely any other subject upon which there is so great diversity of judicial decision. Whenever required to pronounce upon a contract for their sale, courts have seemed uncertain as to whether standing or growing trees should be classed as real or personal property. Not only have the courts of different jurisdictions decided differently, but the decisions of the same court within the same jurisdiction have not always been uniform. Particularly has this been the case with the courts of England, and their latest declaration on this question (*Marshall v. Green*, 1 C. P. Div. 35) has not escaped criticism from very high authority. *Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641; *Benj. Sales* (Ed. 1892) § 126, and article by Prof. Washburn (the learned author of the work on Real Property) published in the *Albany Law Journal*, and to be found in the note to the case of *Purner v. Piercy*, 17 Am. Rep. 595.

The decisions of the highest courts in the several states of the Union have also been greatly at variance with respect to this subject. It will be found, however, upon an examination of them, that the weight of authority preponderates in favor of the view that a contract for the sale of growing trees is a contract for the sale of an interest in land, and is to be so treated. *Hirth v. Graham*, *supra*; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Green v. Armstrong*, 1 Denio, 550; *Slocum v. Seymour*, 36 N. J. Law, 138, 13 Am. Rep. 432; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Buck v. Pickwell*, 27 Vt. 157; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Bish. Cont.* § 1294; and *Washb. Real Prop.* 366, 367.

Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land, just as the coal, the iron, the gypsum, and the building stone which

enter so largely into the business of commerce. Attached to the soil, they pass with the land, as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor, they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or are a part of, the land, and must be so treated by the courts.

We are the better satisfied with the conclusion reached, in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind, of the section of the state whence this case comes, in whose development its people are becoming more largely engaged year by year. But if the contract was not to be treated as the sale of an interest in land, of which it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for the breach of it, we are nevertheless of the opinion that it would be a proper case for the enforcement of the contract. While the doctrine is well established that a court of equity will not, in general, decree the specific performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.

The true equity rule is thus laid down by Story's Equity Jurisprudence (section 33): "The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party, in a perfect manner, at the present time, and in future; otherwise equity will interfere, and give such relief and aid as the exigency of the particular case may require."

The remedy at law would fall short, in the case at bar, of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. Where the fulfillment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by Pomeroy in his book on Contracts (section 15), "to compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess"

Then, again, the trees included within the body of land described in the contract, and bought by the appellant, have not been marked or counted, and he has been forbidden by the appellee to mark or disturb them. He has no way of ascertaining their number but by going on the land, and marking and counting them. After being forbidden to do this, he is without the means of ascertaining the number of the different kinds of trees purchased; and, without knowing their number, it is not possible to ascertain his damages. The remedy at law in this case would clearly be neither adequate nor complete.

For the foregoing reasons, we are of opinion that the court erred in sustaining the demurrer to the bill, and the decree complained of must be reversed.

III. Acceptance and Receipt ⁴

1. ACCEPTANCE

TOMPKINS v. SHEEHAN.

(Court of Appeals of New York, 1899. 158 N. Y. 617, 53 N. E. 502.)

Action by Hiram Tompkins against Cornelius Sheehan. A verdict and judgment were rendered for plaintiff, and defendant appealed to the appellate division, which affirmed the judgment (40 N. Y. Supp. 1150), and defendant again appeals.

GRAY, J.⁵ The plaintiff has sought by this action to recover of the defendant the purchase price of 200 shares of the capital stock of the Congress Springs Company, which, in his complaint, he alleges to have been included in a sale of 1,985 shares to the defendant, as effected for the several owners through the agency of one of their number. It is therein further averred that the agreement with respect to the sale of the 1,985 shares was that it should be conditioned upon the defendant's purchasing and paying for the whole thereof at the price fixed, and that, in pursuance of the agreement, 1,785 shares were delivered to, and paid for by, the defendant; but that, by reason of the plaintiff's certificate having been mislaid, his shares were not included at the time of the delivery. The defendant, by his answer, admitted the purchase of the 1,785 shares of stock, but denied the allegations of the complaint relating to the plaintiff's shares; and, as a further defense, alleged the invalidity of the agreement referred to in the complaint under the statute of frauds.

The circumstances, as developed upon the trial with respect to this controversy, showed that in February, 1890, a block of 1,935 shares

⁴ For discussion of principles, see Tiffany, *Sales* (2d Ed.) §§ 24-31.

⁵ The dissenting opinion of Bartlett, J., is omitted.

of the stock in question was purchased from one Hotchkiss by five persons, of whom the plaintiff was one. The purchase would appear to have been made at the instance or suggestion of the defendant, who soon thereafter, through the controlling interest of this holding, was able to elect his own board of directors, and to become the president of the company. The 1,985 shares were registered upon the books of the company in the names of the five persons by whom they had been bought, in the several amounts to which their interests in the purchase entitled them. Subsequently, and in December of the same year, the defendant through a lawyer, approached Mr. Bockes, who held 496 of the 1,985 shares, with the proposition to buy the whole block of stock. Bockes communicated directly with all of the holders of the shares, except the plaintiff, who was at the time in Chicago, and received their consent to a sale at the price which they had paid for them, with interest at the legal rate added to the date of delivery. Mr. Bockes telegraphed to the plaintiff, and testified that he received a reply assenting to the sale of his shares. That telegram appears to have been lost, and the only one produced by the plaintiff was sent the day after the shares of the other four persons had been delivered to the defendant. On a certain day in December, Mr. Bockes delivered to the defendant, and received from him the agreed price for, 1,785 shares. He had not received the plaintiff's certificate of stock before the closing of the transaction with the defendant, by reason of its not having been found; and, when he did receive it a few days later, he left it at the office of the defendant's attorney, where it remained for some time, before he returned it to the plaintiff, by reason of the defendant's refusal to consider it as included in his purchase of the stock.

On behalf of the plaintiff, the evidence went to show that the sale was expressly conditioned upon the 1,985 shares being sold as an entirety, and that the defendant agreed to that arrangement. On the part of the defendant, the evidence was that the plaintiff's shares were not included in the transaction; the defendant's testimony and that of his attorney contradicting explicitly the testimony given for the plaintiff, and denying that there was any other arrangement entered into than one for the purchase of the 1,785 shares. The issue of fact, as to what the agreement was between Mr. Bockes, acting for himself and the other holders of the Hotchkiss stock, and the defendant, was submitted to the jury, who found in favor of the plaintiff. It was the view of the trial judge, and he so instructed the jury, that, if the agreement was to purchase 1,985 shares of stock, the plaintiff's 200 shares being included in that number, and the delivery to the defendant was made with the understanding that the plaintiff's shares were to be delivered as part of the entire purchase of 1,985 shares, the case would be taken out of the operation of the statute of frauds. Exceptions were taken to the charge in this respect, as they had also been taken to the refusal of the trial judge to dismiss the complaint for

the invalidity, under the statute of frauds, of the alleged parol agreement for the sale or purchase of the plaintiff's shares of stock.

The question of law which is thus presented is sought to be met and answered by the plaintiff, who is respondent here, upon the ground that it was proved, and found as a fact by the jury, that the contract of sale was the joint contract of the plaintiff and the four other persons who, with him, had become the owners of the Hotchkiss shares. That being the fact established by the verdict, he argues that the delivery of a part of the shares made the contract valid under the statute of frauds. In our opinion, however, the facts of this case were not such as to prevent the operation of the statute, which provides that every contract for the sale of any goods, chattels, or things in action, for the price of \$50 or more, shall be void, unless a note or memorandum be made in writing and subscribed by the parties to be charged thereby; or unless there be acceptance by the buyer, in whole or in part, or a part payment of the purchase money. 2 Rev. St. p. 136, § 3. Whatever the understanding or agreement between the plaintiff and his associates with respect to the Hotchkiss shares, in the purchase of which they had combined, it is undisputed that that stock was divided up between them, and thereafter held in severalty; each one becoming the separate and registered holder of the shares allotted to him. When it was proposed by the defendant to purchase these shares, there was no agreement, nor any memorandum in writing concerning it, between him and Mr. Bockes, as representing the five owners of the stock. There was none between the stockholders themselves, affecting their ownership. They were, as between themselves, as they were to the world, the separate owners of the shares standing in their names, and there was nothing in the transaction conducted by Mr. Bockes for a sale of the stock which legally bound them to it.

The mere fact (which must be deemed to have been established by the verdict) that the defendant had agreed with Mr. Bockes to buy all of the 1,985 shares would not make it any the less as to each stockholder a separate transaction, which he might elect to carry out if he chose. There was not such an agency in Mr. Bockes as would have been effectual to bind his associates, and certainly nothing so far as this plaintiff is concerned, beyond his telegraphic expression of a willingness to sell his stock, if the other owners would sell. The separateness of interest in the transaction is illustrated in this very action, which is commenced by the plaintiff alone to recover as for the sale of his own stock. It is the distinct and several ownership of the shares, which interposes a difficulty in the way of the plaintiff's recovery that is not to be overcome by the finding of the jury that the actual agreement of the defendant was to buy all of these shares. The cardinal purpose of the statute of frauds was to lessen the opportunities for the perpetration of fraud by compelling the parties to put their agreements in writing, when their transactions involve more than

a certain pecuniary value; but it recognized that an incontestable fact might equally establish what the agreement between them was, and therefore provided that acceptance, or a part payment, would be sufficient, and would obviate the necessity for the production of some written evidence.

The provisions of the statute of frauds may not be availed of to effectuate a fraudulent purpose; and, where that is clearly seen to be the case, it not infrequently has happened that the court has found a way to afford the relief when an equitable consideration of the facts would warrant. But this is no such case. The question is purely one whether this plaintiff shall recover from the defendant under an alleged agreement on his part to buy 200 shares of stock, which he denies, when the evidence as to its making rests in parol and is irreconcilably conflicting. Under the circumstances, there is no legal reason why the defendant may not insist upon his strict legal rights under the statute of frauds. It is the plaintiff's misfortune that the matter of the sale of his stock rests in parol, as it was, also, his misfortune, upon his version of the facts, that his certificate of stock could not be found in time to be delivered with the certificates of the other stockholders. It is a misfortune for which no legal remedy is available, and the case may be said, not inaptly, to illustrate that precise situation between the parties to a transaction which the statute was intended to apply to and to provide for.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

2. ACTUAL RECEIPT

DORSEY v. PIKE.

(Supreme Court of New York, General Term, 1889. 50 Hun, 534, 3 N. Y. Supp. 730.)

Action by James Dorsey against Rosella E. Pike for the price of machinery sold. Defendant appeals from a judgment entered on a verdict for plaintiff, and from an order denying a motion for a new trial.

BRADLEY, J. The action was brought to recover the price of an engine, boiler, and pump, with appendages, alleged to have been sold and delivered by the plaintiff to the defendant, and to have been purchased by her. The latter denied the sale and purchase. It appears that the defendant was the owner of a stone-quarry, in which she was engaged in quarrying stone for market; and that early in July, 1886, James B. Pike, the husband of the defendant, rented of the plaintiff this apparatus, to use in working the quarry, and it was put in use there for drilling and pumping. The plaintiff claimed, and

gave evidence tending to prove, that in the forepart of the following August an agreement was made between him and the husband, by which the plaintiff agreed to sell, and he agreed to purchase, at the price of \$250, the apparatus to use in the quarry. This is contradicted by evidence on the part of the defendant, and in her behalf further evidence was given, tending to prove that the husband had no authority from the defendant to make such purchase on her account. The burden of proof was with the plaintiff to show that the sale was made, and that the husband was authorized to make the purchase for the defendant. In view of all the circumstances appearing by it, the evidence presented a question of fact upon the subject of the authority of the husband, and permitted the conclusion that he was the defendant's agent in the business of operating the quarry, and marketing the stone taken from it; and upon finding that fact the jury were justified in the further conclusion that he had authority to purchase for her the machinery to be used in working the quarry.

The alleged agreement of sale was evidenced by no writing, and no payment was made of any part of the purchase price. It is therefore contended on the part of the defendant that the agreement was within the statute of frauds, and void. 2 Rev. St. p. 136, § 3. There was no act of delivery and acceptance at the time the alleged contract was made, but the property was then at the quarry, under an arrangement with the husband by which the plaintiff had rented it for use there; and, assuming that the husband was such agent, and rented it for the defendant, the property was then in her possession as lessee. Upon the subject of delivery and acceptance, the trial court charged the jury that the husband then had the possession of the engine, either in his own right, or as agent of his wife; and that, if it was then understood and agreed between the parties that there was or should be a sale, "that sale was a valid sale, and the only question remaining for you to determine is whom the sale was made to;" and that, "if he had the entire possession, of course he could not get any more possession, and there was no necessity of any writing, no necessity of any payment, or necessity of any further delivery." The view of the court evidently was that no act further than the making of the oral agreement of sale and purchase was essential to its validity, and to render the contract effectual, if the property was then in the possession of the party in whose behalf it was made as purchaser. The defendant's counsel took exception to the proposition so charged. The statute requires to support such a contract a subscribed memorandum of it in writing, unless the buyer shall accept the property, or some part of it, or at the time pay some part of the purchase money; and its purpose was not to permit the validity of such an agreement to rest merely in words. The design of the statute was in contracts of this character, having the importance represented by the requisite price of the property, to guard against misunderstanding of the parties and perjury, by requiring, in the absence of any writing subscribed

by the party to be charged, that a portion of the purchase money should at the time be paid, or that then or thereafter the purchaser should by some act accept and receive some of the property. The opportunity and expressed purpose to accept is not sufficient. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316.

Assuming that the machine was in the possession of the defendant at the time the agreement to purchase was made, and that the husband, as her agent, made it, those facts alone were not sufficient to give validity to the contract. To hold otherwise would have the effect to render the mere words of the parties to such a contract effectual, and the purpose of the statute would be defeated. The then possession was in no manner produced by or derived from such contract, but was lawfully taken and held under another and independent arrangement between the parties; and until the purchase was evidenced by some act of acceptance, under or in pursuance of the agreement to buy, no valid sale would be accomplished. This is clearly the expressed import and purpose of the statute, and such is the unbroken current of authority as to its effect. The mere fact that the property was in the possession of the defendant at the time of making the contract furnished no evidence of acceptance in its support. *Edan v. Dudley*, 1 Q. B. 302; *Lillywhite v. Devereux*, 15 Mees. & W. 285; *In re Hoover*, 33 Hun (N. Y.) 553; 1 Benj. Sales, (Corbin,) § 173. But there must be some act or conduct on the part of the buyer, in respect to the property, which manifests an intention to accept it pursuant to or in performance of the contract of sale and purchase, which the parties have sought to make; and, when the evidence is such as to warrant that conclusion, the question is usually one of fact for the jury. *Parker v. Wallis*, 5 El. & Bl. 21; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Stone v. Browning*, 51 N. Y. 211; *Id.*, 68 N. Y. 598.

This case was not entirely without evidence upon the question. There was evidence tending to prove that some use was made of the machine at the quarry, not only after the alleged contract of sale was made, but after Mr. Pike had notified the plaintiff that it was subject to the order of the latter, and would be returned to him at such place in Rochester as he might designate. This notice was given two weeks after the alleged purchase, and apparently indicated a purpose to terminate the arrangement under which the apparatus had been taken, and it in terms imported no intention to accept or retain it under the contract of sale; and whether any act on the part of the defendant's agent (assuming her husband was such) in the control and use of the machine, after such verbal agreement was made, was characterized by his intent to accept it in observance and execution of such contract, was a question for the jury; and to enable them to reach such conclusion, and thus give validity to the contract as one of sale, the fact must fairly have the support of evidence. We do not here intend to express any view upon the weight of evidence on

that subject; but so far as related to the use made of the apparatus after the plaintiff was so notified of the purpose to terminate the arrangement for its service, and return the property to him, there was some evidence on the part of the defendant to the effect that such use was applied to pumping water from a place mentioned, in order to remove a pipe connected with it, and with a view only to take out and remove the pump. This may have been consistent with no intent to accept the property as a purchaser; but, in view of all the evidence upon that subject, we think the question was one of fact for the jury.

The suggestion of the plaintiff's counsel that the question raised by the exception before mentioned was obviated by other portions of the charge of the court does not seem to be supported. The part of the charge in question is not qualified, necessarily or in fact, by any instruction given to the jury. So far as appears, they were permitted to understand that the fact of possession by the defendant of the property at the time of making the contract by her agent (if so made) was sufficient to render the contract of sale valid. While it is true that, in view of such possession, nothing further was required of the plaintiff, by way of delivery of the property, the matter of acceptance requisite to the validity of the contract was dependent wholly upon the voluntary act of the other party to such contract.

It is deemed unnecessary, for the purposes of another trial, to express consideration of any other question presented on this review. The judgment and order should be reversed, and a new trial granted, costs to abide the event. All concur.

SNIDER v. THRALL.

(Supreme Court of Wisconsin, 1883. 56 Wis. 674, 14 N. W. 814.)

COLE, C. J. We think there is no sufficient reason for holding that evidence of the sale of the house by the defendant to the plaintiff upon the chattel mortgage was not admissible under the answer. The answer, in fact, sets up, both as a defense and by way of counter-claim, the sale of the house for the agreed price of \$140, which the plaintiff was to pay in work and materials on demand. What more was it necessary to state in the answer to admit all evidence in regard to the sale of the house? This house seems to have been treated by the owner of the realty as personal property. Boyd gave a chattel mortgage upon it to the defendant when he owned the lot on which it was situated. He testified that he sold the premises to Perkins, subject to the mortgage. The plaintiff bought the premises of Perkins, and says that he purchased this house of him and entered into possession thereof. In this statement, that he purchased the house of Perkins, he is contradicted by other witnesses.

The county court found as a fact that the defendant, on the ninth of June, 1873, sold and delivered to the plaintiff the house for the

sum of \$140, which sum the plaintiff agreed to pay in cash, and in work, services, and materials, upon demand. This finding is amply sustained by the evidence. But the learned counsel for the plaintiff insists that the sale of the house was void, because no note or memorandum of the contract in writing was made and subscribed by the parties to be charged, so as to take the case out of the statute of frauds. It appears that at the time of this sale the plaintiff was in possession of the house and premises. The court finds that the plaintiff went into possession of the house under the sale and has occupied the same ever since. If the plaintiff did take possession of the house under the sale made by defendant, as found by the court, this would meet the conditions of the statute. The transaction then would amount to a delivery of the house by the vendor, or, at all events, it would be all the delivery that could be made, when the nature of the property was considered. It seems to us it would be a complete and perfect sale and delivery of the house, so that thereafter the title would be in the plaintiff. Now, does it make any difference, as affecting the validity of the contract, that the plaintiff had been in possession prior to, or that he was in possession at, the time the chattel mortgage was foreclosed. We cannot see that it should change the result. Certainly, if the plaintiff had removed from the house when the mortgage was foreclosed, had delivered possession to the defendant, and then had purchased the house and gone into possession, there could be no doubt that these acts would take the case out of the statute.

Now, what was done really amounted to this, as we understand the facts. The law surely did not require, under the circumstances, that the plaintiff should go through the idle ceremony of removing from the house, delivering up possession to the defendant, and then going back into possession under the sale in order to make the contract valid. The law is founded in reason and common sense, and requires the performance of no such useless acts to make a sale valid. A person can sell his property to his bailee and make a good delivery thereof without actually taking the property into his own possession and then returning it to the possession of the vendee. The question in the case would seem to be, did the plaintiff really purchase the house on the mortgage sale and go into the possession of the same as the owner under such sale? If he did, as found by the court, the contract was not within the statute. The court also found that there was an agreement between the parties that the plaintiff should pay for the house in money, work, and materials as demanded; and that whatever work had been done by plaintiff, and all money paid and materials furnished by him, had been applied according to the agreement at the time of sale.

It cannot be denied that there is evidence to sustain these findings. It follows from these views that the judgment of the county court must be affirmed.

IV. Earnest or Part Payment ⁶

JACKSON v. TUPPER.

(Court of Appeals of New York, 1886. 101 N. Y. 515, 5 N. E. 65.)

ANDREWS, J. It is conceded that the oral contract of February 28, 1880, for the sale and storage of the ice, was, when made, void, under the statute of frauds. It must also be conceded, under the decisions in this state, that it was not validated by the payment made in May, 1880. By our statute, payment operates to take an oral contract for the sale of goods for the price of \$50 or more, out of the statute, only when made at the time of the contract. 2 Rev. St. 136, § 3. The decisions have construed this provision of the statute with great strictness. *Hunter v. Wetsell*, 57 N. Y. 375, 15 Am. Rep. 508; s. c., 84 N. Y. 549, 38 Am. Rep. 544; *Allis v. Read*, 45 N. Y. 142. It is in substance held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough, in addition to the act of payment, to show that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them, and this being shown a cause of action arises, not on the prior oral contract, but on the new contract made at the time of the payment.

The plaintiffs did not bring their case within this principle. There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain. It is expressly found that when the payment was made nothing was said by either party about the contract of February 28, 1880, or its terms. But a prior void contract may be validated by a subsequent receipt and acceptance by the buyer, pursuant thereto, of the goods, or part of them, which are the subject of the contract. 2 Rev. St. 136, § 3; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370. Where this has been done, the cause of action arises on the original oral agreement, authenticated by the act of acceptance. There is no statute difficulty, as in the case of a subsequent payment, because the statute does not, as in that case, require that the acceptance must be at the time of the making of the oral agreement.

It was found in this case that, after the oral agreement of February 28, 1880, was made, "the said ice was received and accepted by the plaintiffs." It is impossible to construe the finding except as referring to the ice which was the subject of the oral agreement of

⁶ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 32, 33.

that date, and as referring to an acceptance thereunder. This relieved the contract from the bar of the statute.

No question is presented as to the right of the plaintiffs to the judgment recovered, assuming that the contract of February 28, 1880, was validated. The judgment should be affirmed.

WEIR v. HUDNUT.

(Supreme Court of Indiana, 1888. 115 Ind. 525, 18 N. E. 21.)

Action by Charles Weir against Theodore Hudnut for damages sustained by the refusal of defendant to accept corn purchased from plaintiff. From a judgment sustaining a demurrer to the complaint, plaintiff appealed.

ELLIOTT, J. The appellant's amended complaint, omitting the formal parts, is this: "That the plaintiff sold five thousand bushels of corn to the defendant, under a certain contract; that is to say, the defendant agreed to pay to the plaintiff for said corn fifty cents per bushel; and in part payment therefor, in addition to said fifty cents per bushel, the defendant further agreed to hire to plaintiff, and to give him the use of, a sufficient number of sacks in which to sack said corn, and deliver the same to the defendant, which said use of said sacks became and was a part of the consideration and payment for said corn, and a part of the purchase price therefor, which said purchase price would have been more than fifty cents per bushel in cash, but for the payment and furnishing the use of said sacks by said defendant as aforesaid; and it was further agreed by and between the plaintiff and the defendant, as a part of said agreement of sale, that said corn was to be by the plaintiff delivered upon the bank of the Wabash river at a point about two miles above the Louisville & Nashville Railroad bridge, and that the said sum of fifty cents per bushel was to be paid by the defendant to the plaintiff as soon as the same was shelled and delivered upon the bank of the said river, as aforesaid. The plaintiff further says that in pursuance of said contract, and in part payment of the purchase price of said corn, the defendant did then and there at the time of the making of said contract, furnish to the plaintiff fifteen hundred sacks, to have the use of the same for sacking, holding, and delivering said corn, which sacks were of the value of one hundred dollars, and the use of the same, as aforesaid, was worth the sum of twenty-five dollars. The plaintiff further says that he did, according to the terms of said contract, deliver said corn, shelled and sacked, upon the bank of the Wabash river, at the place agreed, in good order and condition, of all of which he then and there notified the defendant, but that the defendant wholly refused and neglected to accept or take said corn according to said contract, etc., and that by reason of the premises the plaintiff was damaged in the sum of one thousand dollars."

This complaint, it is important to note, avers that the delivery of the sacks in which the corn was to be placed to the seller was in part payment of the price of the corn. It is averred, not only that payment was to be made in money and by furnishing the sacks, but that part payment was made of the agreed price by furnishing the sacks. We emphasize the fact that it was agreed that payment should be made by furnishing the seller with sacks, and that the sacks were furnished to him as part payment of the price of the corn which the appellee purchased. It is this fact which distinguished the case from *Hudnut v. Weir*, 100 Ind. 501. Here the complaint avers, and the demurrer admits, that it was agreed that the sacks were to be furnished in part payment, and that in part payment they were furnished. In the complaint which came before us in *Hudnut v. Weir*, there was no such averment. It is, perhaps, difficult to conceive how the averment can be established by evidence, but with that question we are not now concerned, for it is admitted to be true. It will not, of course, be sufficient to prove a part performance, for that will not be an "earnest to bind the bargain," since the plaintiff must prove payment, as payment, of part, at least, of the agreed price. But as the case is now presented to us there was, it is conceded by the demurrer, payment of part of the price agreed upon by the contracting parties. They agreed what should be taken in payment, and what was agreed upon was in part actually paid. What the parties agree shall constitute payment the law will adjudge to be payment. It is competent for parties to designate by their contract how, and in what, payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. *Kuhns v. Gates*, 92 Ind. 66; *Tilford v. Roberts*, 8 Ind. 254.

It has been held in many cases that payment in articles of property will bind the bargain, and prevent the operation of the statute of frauds. *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832; *Bach v. Owen*, 5 Term R. 409; *Phillips v. Mills*, 55 Ga. 633; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Combs v. Bateman*, 10 Barb. 576. A text writer thus states the rule: "There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract need not be made in money, but that anything of value, which by mutual agreement is given by the buyer and accepted by the seller, on account or in part satisfaction of the price, will be equivalent to part payment." 1 *Benj. Sales*, § 194. Another writer says: "The statute evidently contemplates that the part payment shall be made at the time the contract is entered into, and shall be in money or something of value, which is accepted as its equivalent." *Wood, Frauds*, § 294. The thing delivered in part payment must be of some value, but if of any value at all, it will be sufficient to bind the bargain. One of the old writers says that, "if all

or part of the money is paid in hand, or I give earnest money, albeit it is only a penny," the contract is valid. 1 Shep. Touch. 224; Langford v. Tyler, 6 Mod. 162; Artcher v. Zeh, 5 Hill, 200; Wood, Frauds, § 293. Part payment of the price is earnest money and binds the bargain. Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; Bissell v. Balcom, 39 N. Y. 281; 2 Bl. Comm. 447; Wood, Frauds, 294.

The complaint brings the case within the principles declared by the authorities, for it shows that the value of the use of the sacks was \$25, and that the purchase price to that extent was paid by the seller's furnishing the sacks for the use of the buyer. If the seller had agreed to furnish for the use of the buyer a corn-sheller, or some other machine, as part payment of the purchase price, it would be very clear that such a payment would bind the bargain; and there is no difference in principle between such a case and one like the present, for it can make no difference what thing of value is given in part payment. Of course, the thing must be given in part payment of the purchase money agreed upon, or it will be unavailing; but here, as we have said, the property furnished the buyer is conceded to have been in part payment of the agreed price of the corn. Judgment reversed.

V. The Note or Memorandum—Agents Authorized to Sign⁷

DUNHAM v. HOOTMAN.

(Supreme Court of Missouri, 1900. 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.)

Action by W. S. Dunham against W. H. Hartman. Judgment for defendant. Plaintiff appeals.

VALLIANT, J.⁸ This is a suit to recover of defendant damages for refusing to complete a purchase of land which it is alleged was struck off to him on his bid at a foreclosure sale under a deed of trust. Upon the trial, at the close of the plaintiff's evidence, the court instructed the jury that under the evidence the plaintiff was not entitled to recover. Plaintiff took a nonsuit, with leave, and, after an ineffectual motion to set the same aside, brought this appeal.

The evidence tended to show that in 1892 the then owners of the land executed a deed of trust to one Young, trustee, to secure a debt therein specified, subject to prior incumbrances referred to. It was provided in the deed that in case of Young's inability or refusal to act when the debt was due, and payment not made, the then acting sheriff of Johnson county might proceed to foreclose by sale, etc., as

⁷ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 34-40.

⁸ Part of the opinion is omitted.

therein directed. Young did decline to act, and the holder of the debt and deed of trust requested the plaintiff in this suit, who was then the sheriff of that county, to proceed to sell according to the requirements of the deed, which he did. It was an auction sale at the courthouse door, conducted by the sheriff in person, assisted by one of his deputies, who read the advertisement for him. At this auction the defendant bid \$3,050, and the property was struck off to him. The parties went from the place of sale to the sheriff's office, apparently to close the matter, and the defendant was about to write a check for the amount of his bid, when it was suggested by some one present that the sale was made subject to the prior incumbrances. Then defendant said that he "did not figure it that way," and would go and see about it. He then went out, and returned in about two hours, and said he would not take the property unless he was compelled to. After that the sheriff readvertised, and held another auction sale, at which the property was struck off to M. C. Shryack and C. H. Harrison, the highest bidders, for \$725, which sale was consummated. The second sale was about a month after the first.

Plaintiff offered in evidence the following: "I now offer in evidence this memoranda, found on page 270 of the sheriff's sale book,—the memoranda made by the sheriff, and the one made by the deputy sheriff, so far as can be ascertained,—which memoranda is in words and figures as follows, to wit: 'Sold to W. H. Hartman for \$3,050.00. Sold to M. C. Shryack and C. H. Harrison.'" Defendant objected to this as evidence, and the court sustained the objection. Up to this time there had been no evidence of the refusal of the trustee to act, and the request of the holder of the note that the sheriff execute the trust; but such evidence immediately followed the ruling excluding the memorandum, but the memorandum was not again offered. Just when and by whom the memorandum was made is not certain. The deputy sheriff testifies that he made it as soon as the land was struck off to the defendant, while the sheriff testifies that he made it himself after the defendant returned to his office the second time, and informed him that he would not take the land if he was not compelled to, which was about two hours after the auction was over. The next day a deed was tendered to defendant, which he refused. What else, if anything, was on the page 270 mentioned, besides the memorandum read, is not shown by the evidence. There was testimony tending to show that, before offering the property for sale, the sheriff announced that it was to be sold subject to the incumbrances. Whether or not defendant was within hearing at that time, does not appear. This was substantially all that the evidence tended to prove.

1. If we assume that the sheriff was the implied agent of the defendant, and as such authorized to make the memorandum required by the statute of frauds to bind him, the plaintiff's case fails, because the memorandum attempted to be shown in evidence is itself insuffi-

cient. All that we are told of the memorandum is that it was made on the sheriff's sales book, and is in these words: "Sold to W. H. Hartman for \$3,050.00." It was, perhaps, intended to be shown that this memorandum was written on a page in the book in which was the notice of sale, containing the names of the parties and a description of the property; but, if the page contains anything of that kind, it was not offered in evidence, and the record does not show it. In *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800, it is said, "All the authorities are agreed that the memorandum must state the contract with reasonable certainty, so that its essential terms can be ascertained from the writing itself, without resort to parol evidence." This memorandum does not show what was sold, nor for whom the sale was made. Besides, we are left in doubt, between the plaintiff's two main witnesses, as to who made the memorandum, and when it was made. Ordinarily, when the sheriff is acting officially, it makes no difference whether he or his deputy does the act; but in this instance it does make a difference, because, if the sheriff did it, it was not done until after the controversy had arisen, and after the defendant had refused to consummate the sale, two hours after the auction was over. If there was an implied agency, that agency was revoked by the defendant's repudiation of the transaction. Certainly the agent could not act in spite of his principal, and do for him in his presence what he refused to do for himself. Between the fall of the hammer and the writing of his name in the memorandum, the bidder has a *locus penitentiae*, and may withdraw his bid. *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484.

The memorandum was: "Sold to W. H. Hartman for \$3,050.00. Sold to M. C. Shryack and C. H. Harrison." We cannot reconcile the statements of the sheriff and his deputy by concluding that the sheriff was referring to the Shryack and Harrison part of the memorandum, because he said he made the memorandum directly after defendant came to his office the second time that afternoon, and refused to take the property, which was about two hours after the sale. The sale to Shryack and Harrison was nearly a month after. The recognizing of the auctioneer as the agent of both parties in such transactions is one of those judicial encroachments on the terms of the statute of frauds that we inherited with the statute itself from England, and grew out of what the courts considered a necessity; but, having gone to the extent of creating an agent for the party sought to be charged, the courts have always required that his act should be proven with reasonable certainty, and this the plaintiff failed to do in this case.

2. But was the sheriff acting in his official capacity here, and was he for this purpose the defendant's agent? In *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385, it was held that at an auction sale under a deed of trust, the trustee, acting as auctioneer, is not the agent for the buyer, so as to bind him by a memorandum made at the sale. The

ground of the decision is that to construe the trustee, under such circumstances, to be the agent of the bidder, would be to make one party to the supposed contract the other's agent to make the contract. The court quotes from *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295: "The great mischief intended to be prevented by the statute would still exist, if one party to a contract could make a memorandum of it which would absolutely bind the other. If such were its true construction, it would be a feeble security against fraud, or, rather, it would open the door for its easy commission. * * * Nor can it make any difference, as to the power of the vendor to make the memorandum binding on the vendee, that the sale is made by the former in his representative or fiduciary character, as executor, administrator, guardian, or trustee." This court in that case further say: "We are referred to no decided case that adopts the principle contended for by the plaintiff in this suit. The nearest approach to it is found in the case of *Wiley v. Roberts*, 27 Mo. 388, and *Stewart v. Garvin*, 31 Mo. 36, where it is held that a sheriff, in selling lands under an order of court in proceedings for partition, is a competent agent of the parties to make a binding memorandum of the sale made by him. * * * But the sheriff in such cases acts simply in the execution of a judicial power of sale, and not, in strictness, as a trustee. No title is vested in him. He acts merely as the instrument of the law in effecting the sale and conveyance. He is a public officer, and holds his position under the provisions of law, and not as the mere appointee of private parties."

In *Tatum v. Holliday*, 59 Mo. 422, it is held that where a trustee dies, and the court appoints the sheriff to foreclose the deed of trust, the sheriff acts in his official capacity; and the court say, *arguendo*, that he is responsible on his bond for his act. There the trustee had died, and the circuit court had made the appointment of the sheriff upon the petition of the party in interest, as required by the statute (Wag. St. p. 1347; section 8683, Rev. St. 1889). Upon that authority the St. Louis court of appeals decided likewise in *Barclay v. Bates*, 2 Mo. App. 139. If the condition arises, and the court appoints the sheriff to foreclose the deed of trust, as the statute requires, he is as much bound to perform that duty as he would be under a decree of sale to foreclose a mortgage, or to sell for partition, and his official bond covers his acts. But an individual cannot impose official duty on the sheriff, and the sheriff cannot by contract enlarge his official character. In the case at bar the sheriff was not appointed by the court, nor in pursuance of the statute, but by an individual, and in pursuance of the terms of a private deed. In such case he is no more acting in his official capacity, nor liable as such, than he would be if he were employed to assist in any other private business. Whereas, when he is appointed by the court, in the words above quoted, "he acts simply in the execution of a judicial power," yet when he is employed by an individual he is simply a substituted trustee. In the one case

he is responsible as sheriff, on his bond. In the other, he is only liable as an individual. In the one case, if the law were still as it was when *Stewart v. Garvin*, 31 Mo. 36, *Tatum v. Holliday*, 59 Mo. 422, and *Springer v. Kleinsorge*, 83 Mo. 152, were decided, he would have the authority as the implied agent of the bidder, to make a memorandum to bind him, in the face of the statute of frauds. In the other, he would have no such authority. We hold that in this case the sheriff was only a substituted trustee, acting in his individual, and not his official, capacity, and had no authority to bind the defendant by any memorandum he may have made.

3. The doctrine of agency in the auctioneer for both seller and buyer was established when the statute was such that the authority of an agent to bind his principal in a contract for the sale of land need not have been in writing, but might have been conferred orally or have been implied. *Browne*, St. Frauds, §§ 370, 370a. In 1887 our statute was amended so as to require the agent's authority to be in writing. Since then it would be difficult to find any theory on which to base a claim on the implied agency of the auctioneer in a contract for the sale of land. * * * Affirmed.

VI. Effect of Noncompliance with the Statute⁹

TIFT v. WIGHT & WESLOSKY CO.

(Supreme Court of Georgia, 1901. 113 Ga. 681, 39 S. E. 503.)

Action by Wight & Weslosky Company against N. F. Tift and others. Judgment for plaintiff. Defendants bring error.

LITTLE, J.¹⁰ * * * Wight & Weslosky Company instituted an action, under the statute, on an open account, against the administrators of Tift, to recover the sum of \$103.25, which it was alleged the defendants' intestate was due it for one barrel of cement and a named quantity of seed oats, of the value alleged; a bill of particulars, giving date of the purchase and the value of the several articles, being attached to the petition. The defendants were duly served, and answered the petition, admitting that they were administrators as alleged, and denying that they were indebted to the plaintiff in the sum alleged, or in any other sum, or that any such account was due and unpaid, but said that they were not indebted to the plaintiff in manner and form as alleged, either on any account made by the intestate or by themselves. This general denial was all the defense that was pleaded in bar to the action.

⁹ For discussion of principles, see *Tiffany*, Sales (2d Ed.) § 41.

¹⁰ Part of the opinion is omitted.

Briefly stated, the evidence of the plaintiff showed that the oats were sold to the defendants' intestate under a parol contract, and by agreement they were weighed up and set aside for intestate, and his name placed on them, and they were charged to him on the books of the plaintiff. The evidence for the defendants tended to show that the goods were never delivered, but that intestate bought other oats. On the presentation of the case in this court it was contended that the only legal question involved was whether, under the facts, there was a sale of the oats, and it was insisted that the contract shown was an executory contract, under which no title could pass until executed, and the question was presented in the brief under two heads: First, irrespective of the statute of frauds; and, second, as affected by that statute; and, as will be seen, each of the points so made were decided adversely to the contentions of the plaintiffs in error, this court ruling—First, that under the evidence the contract for the sale of oats was executed; and, second, that whether the contract was or was not void under the statute of frauds could not be considered, as no such defense was made, nor was that question passed on by the trial judge. * * *

It is admitted that the statute, as a rule, must be specially pleaded; but it is insisted that there are certain exceptions to this rule, within one of which the case at bar comes. It is contended that, when the statute is not specially pleaded, the validity of the contract sued on may still be raised by demurrer, motion to nonsuit, objection to testimony, or request to instruct the jury; and it is contended that the bill of exceptions shows that this defense was urged on the trial of the case in such a manner as to bring it within the letter and spirit of the exception referred to. The claim that this case comes within an exception to the general rule stated is based on a recital in the bill of exceptions as follows: "After the evidence closed the said judge called upon defendants' counsel to show cause why a verdict should not be directed for plaintiff. Thereupon defendants' counsel presented to the court and argued, as reasons why a verdict should not be directed," certain propositions of law, among them that "the contract, being only a verbal one, did not, by reason of paragraph 7 of the statute of frauds, bind the defendants, since there had been no acceptance of any part of said oats, nor any actual receipt of same, nor had there been anything in earnest or part payment to bind the bargain." After such presentation the court directed a verdict for the plaintiff. Judgment followed accordingly, and a bill of exceptions was taken, on which this court rendered the judgment now sought to be reviewed.

In the brief now before us it is urged that the case of *Johnson v. Latimer*, 71 Ga. 470, does not sustain the ruling made in the second headnote. We beg to differ with counsel in this contention. It is true that the ruling made in that case does not go to the extent of holding that as the statute of frauds was not pleaded a new trial should not be granted, but it does go to the extent of holding that where the statute was not pleaded, and no question was made which invoked the ruling

by the judge on that subject, a new trial would not be granted, although it appears that the contract sought to be enforced should have been in writing. We know of no reason why the facts stated in the record in this case does not bring it directly under the ruling in the Johnson Case. The statute certainly was not pleaded, and, as we view it, there was no question made before the judge which invoked a ruling on the subject as to whether the contract sought to be enforced came within the provisions of the statute of frauds. It is true that, when the trial judge called on counsel for the defendants verbally to show cause why a verdict should not be directed for the plaintiff, they did verbally urge that the contract was obnoxious to the statute, and it is true that, having heard counsel, he then directed a verdict. Why should he not have done so? It was the privilege of these defendants to waive the operation of the statute of frauds, if they chose to do so. Their defenses were only to be adjudged by their pleadings, and verbal statements to the court are not pleadings.

I may say, for myself, that I am not at all attached to what is to us a modern doctrine, that of directing verdicts, which now seems to prevail to a great extent in this state; but I am not prepared to go to the extent of ruling that verbal reasons given to the trial judge why he should not direct a verdict in a particular manner call for a ruling on matters of defense which are not pleaded, but only stated verbally, nor that his failure to consider defenses so stated presents any question for review by this court. The only question, under such circumstances, which could be considered, is whether the court erred in directing a verdict. If the verdict which he directed was demanded by the evidence, then, no matter what reasons counsel may or may not verbally have given to the court why this should not be done, they could not have had any effect as a defense to the action.

Civ. Code, § 2693, par. 7, declares that, to make an obligation binding on the promisor, touching any contract for the sale of goods to the amount of \$50 or more, it must be in writing, etc. In the case of *Armour v. Ross*, 110 Ga. 413, 35 S. E. 787, touching the necessity of pleading the statute as a defense to a contract of the character above indicated, Mr. Justice Lewis, in rendering the opinion of this court, said: "The promisor can avail himself in such a case of a plea that, the statute of frauds requiring the contract to be in writing, the courts cannot enforce a mere oral agreement on the subject. The promisor, on the other hand, can waive this right, which was evidently intended merely as a personal privilege to him." Mr. Browne, in his work on the Statute of Frauds, § 115 (a), says: "The operation, then, which the statute has upon a contract covered by it, is that no enforcement of the contract can be had while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought choose to insist upon this defense. The statute does not make the contract illegal. A contract which was legal and actionable before the statute is legal since, notwithstanding the statute," etc. Again, in the

case of *Draper v. Dry-Goods Co.*, 103 Ga. 663, 30 S. E. 566, 68 Am. St. Rep. 136, Mr. Justice Lewis, in delivering the opinion of this court, said: "The defense of the statute of frauds, like that of a plea of usury, is in the nature of a personal privilege, of which the defendant can avail himself or not, as he sees proper."

It is urged in the brief that, where the plaintiff declares only on the common counts, the defendant is not called upon to plead the statute, but may avail himself of its protection without pleading it; and it is averred that this suit was upon the common counts, "indebted on open account," etc. In reference to this point, we have first to say that, as the statute of frauds is treated as not affecting the validity of contracts, it is a well-established general rule that, unless the privilege of requiring the statutory evidence given by it to the party resisting the enforcement of the contract is sufficiently claimed by him in some proper pleading, the court will proceed with the contract under common-law rules. *Browne, Frauds*, § 508. Mr. Wood in his work on this subject says that correct practice requires that, if a party intends to rely upon the statute of frauds as a defense, he should set it up either by plea or answer, and in most of the states he must do so, or he is treated as having waived the defect. *Wood, St. Frauds*, § 537.

The exception which the movant claims is made by the record in this case is thus stated by the last-named author (section 537): "But this is the rule only in that class of actions where the declaration or complaint sets forth the contract upon which the plaintiff seeks recovery, and has no application in actions of book account or general assumpsit, where the nature of the claim is not set forth, and does not appear until the evidence is actually put in; and in this class of cases the statute may be relied upon in defense, although not raised by any pleadings." Mr. Browne, in his work above cited, thus states the exception: "Where the plaintiff sues on the common counts, and therefore does not disclose the foundation of his case until he puts in his evidence, * * * the defendant will be allowed to insist upon this statutory privilege, although his pleading has not in terms done so." There is, therefore, no difference between the rule insisted on by counsel and that which we recognize as governing this point in the case.

In our opinion, however, counsel are entirely at fault in their contention that the action brought in this case was on the "common counts." The principle is this: If the declaration or petition sets forth the contract on which the recovery is sought, then, in order to take advantage of the statute, it must be pleaded. In such a case the defendant is put upon full notice of the demand of the plaintiff, the character of the demand, and the form in which it exists. But where the declaration or petition is founded upon a "common count" (and, in using the term "common count," common-law pleading is referred to), such as assumpsit for goods sold and delivered, the nature of the claim is not exhibited, and the defendant can avail himself of the statute

without formal pleading; for in that case it is not to be presumed that the defendant has notice of the character of the debt, which is not disclosed by the declaration. The common count referred to bears no resemblance to the statutory form of an action on an open account under the laws of this state.

In the case under consideration the defendants were put upon notice that plaintiff claimed that defendants' intestate was due it a certain sum of money, exceeding \$50, for two articles of merchandise bought by the intestate at a particular date, and that the form of indebtedness was an open account; that is, unliquidated. To avail himself of the privilege of the statute in such a suit, the defendant must plead it, or he will be held to have waived it, because the defendant has the personal privilege to plead it or waive it, and if he does not do one he does the other. He did not plead the statute in this case, and inasmuch as the defense was not made on the trial, or necessarily passed on in a legal way by the trial judge, the question as to whether the contract was void, as being within the statute of frauds, could not properly have been considered by this court. Motion for rehearing denied. All the justices concurring.

EFFECT OF THE CONTRACT IN PASSING THE PROPERTY—SALE OF SPECIFIC GOODS

I. In General¹

LINGHAM v. EGGLESTON.

(Supreme Court of Michigan, 1873. 27 Mich. 324.)

COOLEY, J. The contest in this case relates to a sale of lumber by Eggleston to Lingham & Osborne, and the question involved is, whether the contract between the parties amounted to a sale in præsentia and passed the title, or merely to an executory contract of sale. The lumber, subsequent to the contract and before actual delivery to the purchasers, was accidentally destroyed by fire, and the purchasers now refuse to pay for it, on the ground that it never became their property. The action was brought by Eggleston for goods bargained and sold, and in the court below he recovered judgment.

There appears to be very little dispute about the facts. The lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber the plaintiff had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000 excluding Robinson's share in the four or five piles. The defendants went to the mill yard September 23, 1871, and proposed to buy the lumber. Plaintiff went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After examining the whole to their satisfaction, the defendant agreed upon a purchase, and the following written contract was entered into:

"Flint, September 23, 1871.

"Lingham & Osborne bought from C. Eggleston this day, all the pine lumber on his yard at Birch Run at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid for as follows: Five hundred dollars to-day, and five hundred dollars on the 10th of October next; the balance, one-half on 1st day of January, A. D. 1872, and the rest on the first day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham & Osborne, which shall not be later than

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) § 42.

10th of November next. Also some shingles at two dollars per M. for No. 2 and four dollars for No. 1.

“[Signed] Lingham & Osborne.
 “Chauncey Eggleston, Jr.”

The five hundred dollars mentioned in this contract to be paid at the time of its execution was paid. A few days later defendants went to the mill yard in plaintiff's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber; the defendants claiming that such was the fact. On the ninth day of October, 1871, Lingham met plaintiff on the cars at Flint, and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; plaintiff took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham:

“Holly. Mr. Eggleston: You may load, say ten thousand, if you think best, on each car, and we can have it inspected as it is unloaded. I will try and come up to-morrow.”

When plaintiff reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Such are the undisputed facts in the case; and upon these the jury were instructed in substance that a completed contract of sale was made out, and the plaintiff was entitled to recover the purchase price.

Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory, must usually be determined upon the intent of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these circumstances have an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined are conclusive.

In Blackburn on Sales, 120, the rule on this subject is very clearly and correctly stated as follows: The question, the author says, is “a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as ap-

pearing from the agreement, and to transfer the property when such is the intention of the agreement; not before. In this, as in other cases, the parties are apt to express their intentions obscurely; very often because the circumstances rendering the point of importance are not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction which, in their nature, are more or less technical. Some of them seem very well fitted to aid the court in discovering the intention of the parties; the substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which their contract is to attach are agreed upon. Where the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do any thing to the goods for the purpose of putting them into a deliverable shape, or when any thing is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transfer of the property. But as these are only rules for the construction of the agreement, they must yield to any thing in the agreement which clearly shows a contrary intention. 'The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please.'

In Benjamin on Sales, 214, 215, the same doctrine is laid down, and it is said that "nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel." And see *Id.* 221 et seq.

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwith-

standing weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is that of *Young v. Mathews*, Law R. 2 Exch. 127, where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The court held that the question was one of intention merely, and that it was evident the parties intended the title to pass. To the same effect are *Woods v. Russell*, 5 B. & Ald. 942; *Riddle v. Varnum*, 20 Pick. (Mass.) 280; *Bates v. Conkling*, 10 Wend. (N. Y.) 389; *Olyphant v. Baker*, 5 Denio (N. Y.) 379; *Bogy v. Rhodes*, 4 G. Greene (Iowa) 133; *Crofoot v. Bennett*, 2 N. Y. 258; *Cunningham v. Ashbrook*, 20 Mo. 553.

So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid, are still to be determined by the vendee. *Turley v. Bates*, 2 H. & C. 200; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294.

And even if something is to be done by the vendor, but only when directed by the vendee and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding. *Whitcomb v. Whitney*, 24 Mich. 486; *Terry v. Wheeler*, 25 N. Y. 520.

But the authorities are too numerous and too uniform to justify citation, which hold that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.

A learned author from whom we have already quoted, says of this, that "the rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for any thing else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in the distinction. In general the weighing, etc., must, in the nature of things, be intended to be done before the buyer takes possession of the goods; but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to

him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided they be of value." But the same writer, with candor and justice, adds, that this rule is now "firmly established as English law." Blackburn on Sales, 153. And see *Turley v. Bates*, 2 H. & C. 200, in which this passage is quoted and the conclusion treated as unquestionable.

What then are the facts in this case from which the intent of the parties is to be inferred? The lumber was specifically designated, so that no question of identity could arise. It was not delivered, and the vendor was to place it on board the cars, if desired to do so within a time specified; but as in any event the vendees were to take it at Birch Run, and it was optional with them to load it on the cars themselves or to have the vendor do it for them, and they had no right to require that he should do so after the day named, we think the circumstance that actual delivery was not made is not one of very much importance in the present discussion. What is of more importance is, that neither the quality nor the quantity was determined; and the evidence in the case shows that as to these there might very well be, and actually were great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had.

It will be observed that the contract did not provide how or by whom the inspection and measurement should be made. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate, and we must suppose such was the intent unless something clearly appears in the case to show the contrary. Nothing of that nature appears in the record except the disputed evidence of defendants, that a person was agreed upon for the purpose. The note sent by Lingham to Eggleston proposing that the eight cars be loaded and that the vendees make the proper inspection, was a mere proposition, and never acted upon. It is very evident Eggleston was under no obligation to trust this important transaction exclusively to the vendees, and we have no right to infer that he would have done so.

It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title—nothing to the contrary appearing—the court should have so instructed the jury. The instructions given were in substance directly to the contrary. It follows that the judgment must be reversed, with costs, and a new trial ordered.

BERGAN v. MAGNUS et al.

(Supreme Court of Georgia, 1896. 98 Ga. 514, 25 S. E. 570.)

Attachment by M. T. Bergan against one Allen, in which a claim to the property seized was interposed by J. A. Magnus & Co. From a judgment for claimants, plaintiff brings error.

LUMPKIN, J. An attachment in favor of Bergan against Allen was levied upon a barrel of whisky, a claim to which was interposed by Magnus & Co. The plaintiff's theory was that the whisky had been sold by the claimants to Allen, and that the title had passed into the latter before the attachment was levied. On the other hand, the contention of the claimants was that, under the terms of the contract between themselves and Allen, the sale had never become complete, and that he had never acquired title. There was some question as to whether or not Allen had ever obtained possession of the whisky, the claimants insisting that they had exercised their right of stoppage in transitu, and the plaintiff denying that this was true. In the view we take of the case, however, this question is immaterial; for, even upon the assumption that Allen actually obtained possession, we are of the opinion that the judge, who tried the case without a jury, rightly found for the claimants. The evidence fully and amply warranted him in reaching the conclusion that the sale from Magnus & Co. to Allen was for cash, which the latter was to pay upon delivery of the whisky, and that prepayment of the price was a condition precedent to the sale.

There was no pretense that Allen had paid the price. This being so, even if Allen had in fact obtained possession, the title did not pass to him under the contract, for the reason that he failed to comply with the condition upon which the sale depended. "If the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee." The foregoing is an extract from the opinion of Washington, J., delivered in the case of *Copland v. Bosquet*, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, cited in 1 Benj. Sales, § 336. To the same effect, see *Tied. Sales*, § 206. In *Dows v. Dennistoun*, 28 Barb. (N. Y.) 393, it appeared that certain flour had been sold for cash on delivery; that is, the cash was to be paid within 10 days. Upon these facts, Davies, P. J., remarked: "The very terms and import of this arrangement are that there was to be a qualified delivery, which was to precede the payment; and it is apparent from the facts in this case that the possession of the goods was intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide means for the payment of the price. Such an understanding, arrangement, or custom cannot, we think, be

construed into an absolute transfer of the title to the property, as between the original parties to it or those who have no greater equities than the original parties."

The same doctrine was recognized in *Harding v. Metz*, 1 Tenn. Ch. 610, in which it was held that "if personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." And see *Armour v. Pecker*, 123 Mass. 143; *Salomon v. Hathaway*, 126 Mass. 482; *Mathewson v. Mills Co.*, 76 Ga. 357. Judgment affirmed.

II. Rules for Ascertaining Intention ²

LINGHAM v. EGGLESTON.

(Supreme Court of Michigan, 1873. 27 Mich. 324.)

See ante, p. 79, for a report of the case.

RESTAD v. ENGEMOEN.

(Supreme Court of Minnesota, 1896. 65 Minn. 148, 67 N. W. 1146.)

Action by Peter Restad against Halfdan Engemoen. From a judgment for plaintiff, defendant appeals.

CANTY, J. This action was brought to recover \$38.41, the price of a cow and a steer which plaintiff alleges he sold to defendant. Plaintiff had a verdict, and from the judgment entered thereon defendant appeals.

Plaintiff testified that about March 1, 1892, defendant came to his farm, looked at the cow and the steer, and agreed to give him 2 cents per pound for the cow and 2.35 cents per pound for the steer, paid him \$1 on the cow and \$1 on the steer, and asked him to keep them, and feed them corn and potatoes, until April 26th following, and then to deliver them to defendant at Pelican Rapids, a town some distance from the farm; that plaintiff did so keep, feed, and deliver them, but that defendant refused to receive them. Thereupon plaintiff weighed them, and thereby ascertained the amount of the purchase price. Defendant testified that he told plaintiff that he would take the cattle at the price specified if plaintiff would "feed them up to beef." Said the witness: "I told him I could not handle cows at all unless they were fed up to beef. * * * They were very poor. I could not

² For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 43.

take them because they were not fed up to beef." Plaintiff testified that defendant merely told him to feed "them a little potatoes and corn, but don't give them too much any of the time," and denies that he agreed to fatten them.

We are of the opinion that the evidence does not sustain the verdict and judgment. In *Martin v. Hurlbut*, 9 Minn. 142 (Gil. 132), the following extract is quoted with approval from *Joyce v. Adams*, 8 N. Y. 291: "It is a general rule of law that, where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. But, if anything remains to be done on the part of the seller, as between him and the buyer, such as weighing, measuring, or counting out of a common parcel, before the goods purchased are to be delivered, until that is done the right of property has not attached in the buyer." See, also, *Rail v. Lumber Co.*, 47 Minn. 422, 50 N. W. 471. In *Benj. Sales* (book 2) c. 3, one of Lord Blackburn's rules is stated as follows: "First. Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, 'into a deliverable state,' the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

In the present case there were altogether too many things to be done by the vendor to the chattels before delivery, and too few circumstances indicating an intention to vest title immediately, so that a finding that such intention existed cannot be sustained. Plaintiff's remedy was an action for damages for a breach of the executory contract. Judgment reversed, and a new trial granted.

III. Reservation of Right of Possession or Property³

1. CONDITIONAL SALES

HARKNESS v. RUSSELL & CO.

(Supreme Court of United States, 1886. 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.)

BRADLEY, J.⁴ This is an appeal from the supreme court of Utah. The action was brought in the district court for Weber county, to re-

³ For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 44.

⁴ Part of the opinion is omitted.

cover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts, and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the second of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of \$4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to-wit:

“Salt Lake City, October 2, 1882.

“On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1,026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, \$300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due, and take possession of said engine and saw-mill when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw-mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may, without sale, indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt, or claim as exempt, any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be enacted.

“P. O., Oxford, Oneida County, Idaho Territory.

“\$300.

Phelan & Ferguson.”

Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson on the execution of the notes, and subsequently

they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The territory of Idaho has a law relating to chattel mortgages, requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached that it is bona fide, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson and of Russell & Co. that the title to the said property should not pass from Russell & Co. until all the notes were paid. Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant, and gave judgment for the plaintiff. The supreme court of the territory affirmed this judgment.

The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit, and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipula-

tion was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases.

In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established: (1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; (2) that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackb. Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property; and, if they do so, their intention is fulfilled." Blackb. Sales, 167.

Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to-wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, (2d Ed.) 236; Id. (3d Ed.) § 320. The author cites for this proposition *Bishop v. Stillito*, 2 Barn. & Ald. 329, note a; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Barrow v. Coles*, (Lord Ellenborough,) 3 Camp. 92; *Swain v. Shepherd*, (Baron Parke,) 1 Moody & R. 223; *Mires v. Solebay*, 2 Mod. 243.

In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional

only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed; the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of *Lamond v. Duvall*, 9 Q. B. 1030; and many more cases could be cited. * * *

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not advertng to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and, when this is charged, all the circumstances of the case, this included, will be opened for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In *Hussey v. Thornton*, 4 Mass. 405, 3 Am. Dec. 224 (decided in 1808,) where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee.

This case was followed in 1822 by that of *Marston v. Baldwin*, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay \$100, (part of the price,) which condition was not performed, though the goods were delivered. Holt had paid

\$75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained.

In *Barrett v. Pritchard*, 2 Pick. (Mass.) 512, 13 Am. Dec. 449, the court said: "It is impossible to raise a doubt as to the intention of the parties; for it is expressly stipulated that 'the wool, before manufactured, after being manufactured, or in any stage of manufacture, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * *

In *Coggill v. Hartford & N. H. R. Co.*, 3 Gray (Mass.) 545, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. * * *

This case was followed in *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Deshon v. Bigelow*, 8 Gray, 159; *Whitney v. Eaton*, 15 Gray, 225; *Hirschorn v. Canney*, 98 Mass. 149; and *Chase v. Ingalls*, 122 Mass. 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of *Forbes v. Marsh*, 15 Conn. 384, (decided in 1843,) in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of *Hart v. Carpenter*, 24 Conn. 427, where the question arose upon the claim of a bona fide purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale and to his creditors; though there has been some diversity of opinion in its application to bona fide purchasers from such vendee.

As early as 1822, in the case of *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English bankrupt act did not apply here. The chancellor remarked, however, that "if the goods had been fairly sold by P., [the conditional vendee,] or if the proceeds had been actually appropriated by the assignees before notice of this suit and of the injunction, the remedy would have been gone." * * *

In *Herring v. Hoppock*, 15 N. Y. 409, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. * * *

In the cases of *Smith v. Lynes*, 5 N. Y. 41, and *Wait v. Green*, 35 Barb. 585, Id. 36 N. Y. 556, it was held that a bona fide purchaser, without notice from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of *Ballard v. Burgett*, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt, and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See *Cole v. Mann*, 62 N. Y. 1; *Bean v. Edge*, 84 N. Y. 510. * * *

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons without notice. *George v. Stubbs*, 26 Me. 243; *Sawyer v. Fisher*, 32 Me. 28; *Brown v. Haynes*, 52 Me. 578; *Boynton v. Libby*, 62 Me. 253; *Rogers v. Whitehouse*, 71 Me. 222; *Sargent v. Gile*, 8 N. H. 325; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446; *Hefflin v. Bell*, 30 Vt. 134; *Armington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366; *Fales v. Roberts*, 38 Vt. 503; *Duncan v. Stone*, 45 Vt. 123; *Moseley v. Shattuck*, 43 Iowa, 540; *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. 3.

The same view of the law has been taken in several other states. In New Jersey, in the case of *Cole v. Berry*, 42 N. J. Law, 308, 36 Am. Rep. 511, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and

gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in *Cole v. Berry*, 42 N. J. Law, 314 (36 Am. Rep. 511), where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to bona fide purchasers. *Chamberlain v. Smith*, 44 Pa. 431; *Rose v. Story*, 1 Pa. 190 [44 Am. Rep. 121]; *Martin v. Mathiot*, 14 Serg. & R. 214 [16 Am. Dec. 491]; *Haak v. Linderman*, 64 Pa. 499 [3 Am. Rep. 612]." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing,—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent per se."

In this connection, see the case of *Copland v. Bosquet*, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a bona fide purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought to our attention is that of *Call v. Seymour*, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the separator and horse-power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due, and take possession of said separator and horse-power, at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities pro- and con duly considered by the court, which sustained the condition

expressed in the contract, and affirmed the judgment for the plaintiff. See, also, *Sanders v. Keber*, 28 Ohio St. 630.

The same law prevails in Indiana. *Shireman v. Jackson*, 14 Ind. 459; *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311; *Bradshaw v. Warner*, 54 Ind. 58; *Hodson v. Warner*, 60 Ind. 214; *McGirr v. Sell*, 60 Ind. 249. The same in Michigan. *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lozo*, 42 Mich. 6, 3 N. W. 227; *Marquette Manuf'g Co. v. Jeffery*, 49 Mich. 283, 13 N. W. 592. The same in Missouri. *Ridgeway v. Kennedy*, 52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659; *Sumner v. Cottey*, 71 Mo. 121. The same in Alabama. *Fairbanks v. Eureka*, 67 Ala. 109; *Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104. The same in several other states. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to *Benj. Sales*, (4th Ed.) § 320, pp. 329-336; and Mr. Freeman's note to *Kanaga v. Taylor*, 70 Am. Dec. 62; *Id.* 7 Ohio St. 134. It is unnecessary to quote further from the decisions. The quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the supreme court of that state is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the mean time, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a bona fide purchaser, or an execution creditor of the latter, is entitled to protection as against the claim of the original vendor. *Brundage v. Camp*, 21 Ill. 330; *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 488, 95 Am. Dec. 455; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Lucas v. Campbell*, 88 Ill. 447; *Van Duzor v. Allen*, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such.

In the case of *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a cer-

tain rent, payable at stated times during the ensuing year, with an agreement that, if the rent was duly paid, the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons unless the agreement was recorded, (which it was not in proper time,) decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599, and 7 Wall. 139, 19 L. Ed. 109, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that state on the subject under consideration.

The case of *Hervey v. Rhode Island Locomotive Works* is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion, for it is apparent that the only points decided in that case were—first, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors after its delivery to the vendees, whereby the latter became the ostensible owners, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they

cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of *Hervey v. Rhode Island Locomotive Works*, will be found to support their views. The whole question in *Heryford v. Davis* was as to the construction of the contract. This was in the form of a lease, but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company." The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the

present case which makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that, at the time of and prior to the sale, he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners; but as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made, has been performed.

The judgment of the supreme court of the territory of Utah is affirmed.

SPOONER v. CUMMINGS.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 313, 23 N. E. 839.)

Replevin of a horse. Answer, general denial. Plaintiff proved ownership prior to May 26, 1888, and identified the horse as the one described as "one black horse called 'Jenks horse,'" delivered to D. F. Pope, but never paid for, under the following contract:

"Hudson, May 26, 1888.

"Received of L. R. Spooner, this day, one gray mare, called 'Horton mare;' one gray horse, called 'Jenks horse;' one black horse, called 'Jenks horse;' one white-nose horse, called 'Boston horse;' for which I promise to pay said L. R. Spooner or order five hundred seventy-five dollars, one month from date, at City National Bank, with interest at 7 per cent. Said horses and mare to be and remain the entire and absolute property of said Spooner until paid in full by me. And I hereby agree to keep said horses and mare in good order and condition, as the same now are. And should said horses and mare die before said sum is fully paid, I hereby agree to pay all sums due thereon. And should said horses or mare be returned to or taken back by said Spooner, I agree that all payments made thereon may be retained by said Spooner for the use of said horses and mare.

Daniel F. Pope."

Plaintiff kept a livery and sale stable in Worcester, and had sold horses to Pope largely within the past three or four years. Plaintiff asked the court to rule that under the answer defendant could only show that the contract relied on was not made, or that the horse had been paid for; but the court ruled that defendant might show, also, that plaintiff gave Pope authority, express or implied, by the course of dealing, to sell the horse before he paid for it.

Against his objection, plaintiff was required to answer, in cross-examination, the following question: "What was the course of dealing between you and Pope in the year 1888, about May 26th, and extending back a little and forward a little?" and the following evidence from plaintiff in cross-examination, was admitted: "I sold Pope fifty horses, perhaps, in the year 1888. I supposed that Pope wouldn't use fifty horses in his livery stable unless he sold some. He usually kept from twenty-five to thirty. Naturally he would want to sell some that he had, or some other ones, to make room. I didn't expect he would sell any of mine until he paid for them. I would have made objections to his selling one of my horses, even if he sent me the money the next day."

Pope was permitted to testify that "the course of dealing between plaintiff and me was I'd buy horses and give these contracts, and I'd send him money, and he'd apply it where he saw fit, on any of these contracts. He used to urge me to sell, that he had a barn full. Sometimes I'd tell him I wanted a horse for a particular person. I told him this time I wanted a horse for a teamster."

J. A. Trull was permitted to testify that about the middle of June, 1888, Spooner told him to tell Pope that he had a carload coming, and to sell as many as he could. Defendant bought this horse of Pope, June 2, 1888, and paid cash at the time.

KNOWLTON, J. Under the answer of the defendant, any evidence was competent which tended to contradict the contention of the plaintiff that the title to the horse and the right of possession were in him. *Verry v. Small*, 16 Gray, 122; *Whitcher v. Shattuck*, 3 Allen, 319. The defendant was not a party to the written contract between the plaintiff and Pope, but claimed outside of it, and in support of his own title he might show by parol what was the real arrangement between them, even if it differed from that contained in the writing. *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860. If the plaintiff expressly or impliedly authorized the sale by Pope to him, he, having bought in good faith from the apparent owner, acquired a good title. It is immaterial whether his right depends upon an actual authority to make the sale, or upon facts which estop the plaintiff from denying the validity of the sale. *Burbank v. Crooker*, 7 Gray, 159, 66 Am. Dec. 470; *Haskins v. Warren*, 115 Mass. 514, 538; *Tracy v. Lincoln*, 145 Mass. 357, 14 N. E. 122; *Bank v. Buffinton*, 97 Mass. 498; *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799.

The testimony as to the course of dealing between the plaintiff

and Pope, involving a long series of transactions, all of the same kind, and conducted generally in the same way, was competent, as tending to show an expectation and understanding on the part of both that Pope would sell the horses which he bought of the plaintiff as he had opportunity, and that he was impliedly authorized to sell this horse to the defendant. *Hubbell v. Flint*, 13 Gray, 277; *Bank v. Goodsell*, 107 Mass. 149; *Lynde v. McGregor*, 13 Allen, 172; *Bragg v. Railroad Corp.*, 9 Allen, 54. The testimony of Trull, as to the message sent to Pope by the plaintiff about the middle of June, was of a conversation so soon after the sale of June 2d to the defendant that the judge might well admit it in his discretion. It related to the general course of dealing, of which the sale to Pope of the horse replevied was a part.

The jury were rightly permitted to find that the plaintiff impliedly authorized the sale by Pope to the defendant, and that he was estopped to deny the validity of the title which the defendant acquired, relying on Pope's possession and apparent ownership. Exceptions overruled.

PEOPLE'S FURNITURE & CARPET CO. v. CROSBY et al.

(Supreme Court of Nebraska, 1898. 57 Neb. 282, 77 N. W. 658, 73 Am. St. Rep. 504.)

IRVINE, C. The People's Furniture & Carpet Company sold to Mrs. Crosby a bedstead, mattress, and pillows for \$92.50. The sale was evidenced by a written contract under the guise of a lease, with an option in the lessee to purchase. In legal effect, the contract was plainly one of conditional sale, the vendor reserving title as security for the purchase money. Payments were made from time to time, not always according to the terms of the so-called lease, and some after the time when, by its terms, payment should have been complete. In this way there was paid altogether the sum of \$87, leaving \$5.50 unpaid. Mrs. Crosby thereafter sold, or attempted to sell, the bedstead and mattress, to Ellis Coder, and gave him possession thereof. The People's Company later sued on a writ of replevin for the goods, and they were taken from the possession of Coder. The suit was brought in the court of a justice of the peace. On appeal Coder recovered a judgment, and the plaintiff brings the case here on error.

A decision is sought on several points relating to the construction and legal effect of the contract, but the judgment must be affirmed on a consideration of only a part of the transactions. The writ of replevin was sued out against Mrs. Crosby alone, the original vendee. No demand was made upon her, nor was there ever any service of process upon her. An agent of the plaintiff went with

the officer, while he held the writ, to the house of Coder, and there demanded the property. The agent informed Coder of the rights of the plaintiff, of which he seems to have been in fact ignorant, although charged with notice by a proper filing of the contract for record. As soon as possible, and before the property had been removed, Coder made a tender of the amount which the agent stated to be due. It is true that this amount was \$5.50, and Coder tendered \$6, demanding the change; but the tender was not refused because not of a legal character, but because the costs of the replevin proceedings were not included. When the tender is refused because not deemed sufficient in amount, and absolutely, it cannot be avoided merely because not in lawful money to the precise amount. *Guthman v. Kearn*, 8 Neb. 502, 1 N. W. 129; *Grazing Co. v. Price*, 22 Neb. 96, 34 N. W. 97. The officer then took the goods. Afterwards Coder made a precise legal tender to the plaintiff, and it was refused. Later Coder's name was inserted in the writ and other papers, and he appeared and defended.

We think it is the law—and it certainly ought to be—that where goods have been sold, reserving title as security for the purchase money, a large portion thereof has been paid, and the vendor has accepted payments, as in this case, after the day when payment should have been completed, he is in no position to retake the goods without notice and without demand. In such case a tender on demand of the amount remaining due is sufficient to retain in the vendee the right of possession. *O'Rourke v. Hadcock*, 114 N. Y. 541, 22 N. E. 33; *Taylor v. Finley*, 48 Vt. 78; *Machine Co. v. Bothane*, 70 Mich. 443, 38 N. W. 326.

Besides the objection to the tender already disposed of, it is said that it was not kept good, and that it should have included costs. The whole of the record before the justice of the peace is not before us. So far as we have the record here, the tender seems to have been kept good, and we need not, therefore, inquire whether it was necessary to do so. On the other point, it is quite clear that there was, when the tender was made, no liability for costs. The cases cited as holding that no demand is necessary prior to bringing suit are cases where the question was as to the liability for costs at the close of the action, or where the attempt was to defeat an action in replevin for want of demand. In such cases it is held that asserting a right in one's self avoids the necessity of a previous demand. In such cases the demand reaches only the question of procedure. It has not been held, nor is it the law, that when a demand is necessary, not merely to lay the foundation for the remedy, but to complete a right of possession in the plaintiff, the defendant, by denying the right of possession, waives such requisite thereto. Under the rule above stated the plaintiff was in no position to assert a right of possession until a demand had been made, and there had been afforded an opportunity to make the remaining payment. The suit

had been instituted without a demand. Coder was not a party, and the officer was then, as to him, a trespasser. He was not required to pay costs on his own account. Regarding him as the representative of Mrs. Crosby, the situation is the same. The plaintiff had no right of action against her until demand—not for the goods, but for the money. The writ had been sued out without such demand, and when tender was made she was not liable for the costs then accrued.

The point is not made, but it undoubtedly suggests itself, that interest was properly demandable from the time payment should have been made. The tender was made of the amount which the plaintiff's agent stated remained unpaid, and defendant had a right to rely on such statement.

Error is assigned on the admission in evidence of certain documents from the files of the justice. The case was tried to the court without the intervention of a jury, so these assignments are unavailing. Moreover, the evidence objected to was competent and material as showing that when tender was made Coder had not been sued. Affirmed.

2. RISK OF LOSS

TUFTS v. GRIFFIN.

(Supreme Court of North Carolina, 1890. 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863.)

Action by James W. Tufts against J. S. Griffin on a note given by defendant for part of a purchase price of a soda fountain purchased by him of plaintiff. By the contract of sale the title to the property sold was not to pass until the entire price was paid. The property was destroyed before the note matured. Judgment for plaintiff, and defendant appeals.

SHEPHERD, J. This is a case of the first impression in this state. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one, (see *Clayton v. Hester*, 80 N. C. 275; *Frick v. Hilliard*, 95 N. C. 117; and the cases cited,) and, under the contract, the defendant took the apparatus into his possession, and used it in all respects as his own. Without any negligence on the part of the defendant and before any default in the payment of the purchase money, the property was destroyed by fire. The question is, who shall bear the loss?

The defendant insists that it should fall upon the plaintiff because the transaction amounted to nothing more than an executory agree-

ment to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called "executory," (as in the case of *Ellison v. Jones*, 26 N. C. 48,) and the vendee is also termed a "bailee," (*Perry v. Young*, 105 N. C. 466, 11 S. E. 511,) but it must be observed that these expressions are used in reference to the strict, legal title to the property, and they can therefore have no influence in the determination of the present question, which is purely one of considerations for an absolute promise to pay.

The recent decision in *Burnley v. Tufts*, 66 Miss. 49, 5 South. 627, 14 Am. St. Rep. 540, is directly in point. There, it seems that this same plaintiff sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes had been paid, and before the maturity of the others. The court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The court says: "*Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for,—viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do except to receive the purchase price. The purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract; but it is whether by the contract he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do.*"

As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale to be defeated upon the non-performance of the conditions. * * * The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions." 1 Whart. Cont. § 617. The vendee had the actual, legal, and rightful possession with a right of property upon the payment of the money. *Vincent v. Cornell*, 13 Pick. 296, 23 Am. Dec.

683. The vendor could not have interfered with this possession "until a failure to perform the conditions." *Newhall v. Kingsbury*, 131 Mass. 445. Having acquired these rights, under the contracts, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff.

The case of *Swallow v. Emery*, 111 Mass. 356, cited by the defendant, may, perhaps, be distinguished from ours, because it was agreed that, upon the payment of the price, the vendor was to execute a bill of sale to the vendee. However this may be, we think that the principles enunciated in *Burnley v. Tufts*, *supra*, are better sustained, both by reason and authority, and we therefore affirm the judgment of the court below. No error.⁵

IV. Sale on Approval or Trial⁶

HUNT v. WYMAN.

(Supreme Judicial Court of Massachusetts, 1868. 100 Mass. 198.)

Contract on an account annexed for \$250 as the price of a horse. Writ dated September 5, 1867. Answer, a general denial. At the trial in the superior court, before Morton, J., the plaintiff testified that he had the horse for sale, and on the evening of August 12, 1867, the defendant looked at it and inquired the price, and was told \$250; that the defendant said nothing further about price, but asked the character of the horse, and was told that the horse was six years old, sound, kind, and afraid of nothing but goats; that the defendant wished to take the horse to try it, and at this the plaintiff hesitated, and the defendant then told him that "if he would let him take the horse and try it, if he did not like it he would return it, in as good condition as he got it, the night of the day he took it," to which the plaintiff assented; and that the next day the defendant sent his servant and took the horse from the plaintiff about eleven o'clock in the forenoon.

The plaintiff further testified that the horse was taken for the purpose of trying it; that a short time after it was taken a message was brought to him that, before it reached the defendant's place, it escaped from the servant, ran away and was injured; that on receiving the message he went to the stable where the horse was, and found it injured so severely that it could not be used or removed prudently;

⁵ Compare *Dunlap v. Grote*, 2 C. & K. 153 (1845).

⁶ For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 45.

that, on account of the injury, the defendant had no opportunity to try the horse; that he did not expect that the defendant would finally take the horse until after he had tried it; that the defendant had neither returned the horse nor offered to return it; and that the plaintiff had nothing to do with the horse since he put it in charge of the defendant's servant. There was no evidence, and it was not contended by the plaintiff, that the horse was injured by fault of the defendant or his servant.

The judge ruled that the plaintiff could not maintain his action on this evidence, and directed a verdict for the defendant which was returned; and the plaintiff alleged exceptions.

WELLS, J. Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligations implied by law, must be derived from the statement of the defendant, that, if the plaintiff "would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it." This contract, it is true, is silent as to what was to take place if he should like it, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.

A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence.

This action, being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported. Exceptions overruled.

V. Sale or Return⁷

HOUSE v. BEAK.

(Supreme Court of Illinois, 1892. 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.)

Assumpsit for goods sold, brought by Amelia Beak and Alfred Bucher, late partners under the firm name of Beak & Bucher, suing for the use of Wight Bros., a copartnership, against Everett House, S. G. Lea, and others, composing the firm of Lea & Co. There was a judgment for plaintiffs, which was affirmed by the Appellate Court, and defendants appeal.

MAGRUDER, C. J.⁸ * * * It is further assigned as error that the court refused to instruct for the defendants as follows: "The jury are instructed that, as to the claim of plaintiffs for goods claimed to have been consigned by plaintiffs to defendants, there is no sufficient evidence to support a verdict," etc. The point is made that a portion of the goods was consigned to the defendants, to be paid for when sold, and to be returned if not sold; and that an action of assumpsit on the common counts cannot be maintained to recover for the goods so consigned, because there is no evidence of their sale by the defendants, or of a demand for their return by the plaintiffs.

Under the proofs in this case the goods in question were not consigned to the defendants to be sold by the latter as agents of the plaintiffs, but the agreement between the parties was what is known as a contract "on sale or return." "A contract 'on sale and return' is an agreement by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate if sold again by the latter, and, if not sold, to be returned." Story, Sales, § 249. If the vendee returns the goods, the contract of sale is at an end; if he does not, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. If no time is specified within which the return is to be made, the law implies that they are to be returned within a reasonable time. What is a reasonable time will depend upon the circumstances of each case. *Id.* In such cases the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed or reasonable time. The price is fixed at the time of the sale and delivery of the goods. The purchaser deals with the goods as his own, disposes of them as he pleases, for cash or on credit, is under no obligation to give any account of his disposition of them, and is only liable to pay

⁷ For discussion of principles, see Tiffany, Sales (2d Ed.) § 46.

⁸ The statement of facts is rewritten and part of the opinion is omitted.

for them at a price fixed beforehand, without any reference to the price at which he sells them. *Jameson v. Gregory*, 4 Metc. (Ky.) 363; *In re Linforth*, 4 Sawy. 370, Fed. Cas. No. 8,369; *Ex parte White*, *In re Nevill*, L. R. 6 Ch. App. 397.

In *Moss v. Sweet*, 3 Eng. Law & Eq. 311, where goods were delivered to the defendant to sell again, upon his agreement to account for such as were sold at the invoice price, with an option to return the residue within a reasonable time, and where he sold a portion, but failed to return the rest, it was held that his failure to return rendered him liable as upon an absolute sale and to an action for goods sold and delivered.

The bargain called "sale or return" means "a sale with a right on the part of the buyer to return the goods at his option, within a reasonable time, and * * * the property passes; and an action for goods sold and delivered will lie if the goods are not returned to the seller within a reasonable time." 2 Benj. Sales, (6th Amer. Ed.) § 913, p. 794.

Such sales may be regarded as subject to a condition subsequent,—that is, upon condition that, if the goods are not sold, they are to be returned. Therefore the property vests presently in the vendee, defeasible on the performance of the condition. If the defendant disables himself from performing the condition, or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*. *Ray v. Thompson*, 12 Cush. 281, 59 Am. Dec. 187.

These definitions of a contract "on sale or return" fit the facts in the case at bar. The prices were fixed upon the goods when they were ordered. The consigned goods were to be paid for when sold, at the prices invoiced; and such as were not sold were to be returned. As no time for the return was fixed, a reasonable time was implied. The defendants kept the goods for more than three years without offering to return them, and accepted itemized accounts of them without objection. Demands were frequently made upon them to pay for the consigned goods, and, if such goods were unsold at the dates of such demands, offers should have then been made to return them. Under the circumstances, we think the defendants failed to exercise their option within a reasonable time, and are liable as upon an absolute sale. There was therefore no error in refusing the instruction.

The cases of *Creel v. Kirkham*, 47 Ill. 344, and *Johnston v. Salisbury*, 61 Ill. 316, have no application here, as in those cases there was no sale of the personal property by a vendor to the vendee so as to vest the title thereto in the latter at the time of delivery. Nor do we think that the case of *Jones v. Wright*, 71 Ill. 61, conflicts with the doctrine here announced. It was there said that the arrangement was, in legal effect, a sale, with the privilege of returning the property when the buyer should choose to make such return or on

the demand of the seller. The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller; but, if the seller does not want the property, and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time.

In the present case, demands made for the price of the consigned goods, unanswered by either the payment of the money or an offer to return the goods, amounted substantially to such a refusal to surrender on demand as was held to be sufficient in the Jones Case. The judgment of the appellate court is affirmed.

EFFECT OF CONTRACT IN PASSING THE PROPERTY— SALE OF GOODS NOT SPECIFIC

I. In General ¹

BROWNFIELD v. JOHNSON.

(Supreme Court of Pennsylvania, 1889. 128 Pa. 254, 18 Atl. 543, 6 L. R. A. 48.)

CLARK, J. A complete understanding of the rules of law governing this case involves a brief statement of the material facts: On the 2d day of December, 1886, Brownfield & Co., the defendants, gave an order to Lawrence Johnson & Co., to purchase for them in Brazil 300 bags best quality of new Brazil nuts, of the first receipts, payment to be made in cash on arrival, or by 60-day note, etc., at the defendants' option, the plaintiffs to cable price at the time of shipment. On the same day the plaintiffs replied, stating that Brazil nuts were not bought by the bag, but by hectolitres, a measure which in past years averaged from 100 to 120 pounds; that the nuts came in bulk in the steamer, and the defendants would have to furnish the bags on arrival in New York; and as "the outturn of the measure is uncertain" they proposed to order 450 hectolitres, etc. To this the defendants replied by telephone: "Order 400 hectolitres, and buy only the very best nuts obtainable." The plaintiffs placed the order in the hands of their correspondents, La Roque, Da Costa & Co., Para, Brazil, who undertook the purchase, and on the 9th of February following advised the plaintiffs of shipment per steamer Portuence, upon board of which were nearly 6,000 hectolitres of Brazil nuts for other parties. Of this shipment, and of the price, notice was on the same day given to the defendants. Upon the arrival of the Portuence in New York, Lawrence Johnson & Co., handed to the defendants a delivery order for 400 hectolitres of Brazil nuts in bulk, in separate hold, on board the Portuence, with copy of original invoice, and the plaintiffs' bill, amounting to \$3,441.18. The invoice was for 312 hectolitres at 15,150 reis each, and 88 hectolitres at 14,000 reis each; showing that the nuts had been originally purchased in two separate lots, and at different prices. The defendants, with the delivery order in their possession, proceeded to New York, and went on board the Portuence, where they found one consignment of nuts in the name of Brownfield & Co., but the plaintiff's storekeeper informed them that the 400 hectolitres in question were embraced in a consignment of 582 hectolitres of Brazil nuts, in separate hold,

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 47, 48.

in the name of the plaintiffs. The defendants thereupon refused to receive any portion of these nuts as an execution of their order. The plaintiffs tendered to the defendants the whole 582 hectolitres or 400 hectolitres thereof, at their option, at the invoiced prices; which tender, in either alternative, the defendants declined to accept. The plaintiffs afterwards tendered 400 hectolitres at the average price, which the defendants also declined. Subsequently the plaintiffs separated the 400 hectolitres from the lot, and notified the defendants of their weight, but the defendants absolutely declined to accept the nuts on any of the several propositions made by the plaintiffs. The 582 hectolitres were made up of two lots,—one of 312 hectolitres, invoiced at 15,150 reis; the other of 270 hectolitres, invoiced at 14,000 reis; 88 hectolitres of the latter were invoiced to the defendants, and the residue, being 182 hectolitres, to Lawrence Johnson & Co., for account of La Roque, Da Costa & Co., who, it is said, according to the method of dealing in Brazil, in order to get 88 hectolitres to fill the order, were obliged to buy a larger lot. That all parties acted in good faith is a fact found by the jury, and the case turns upon the question whether the defendants' order was properly and legally executed.

If the purchase had been of 400 hectolitres only, shipped in separate hold, there could be no question as to the defendants' liability for the price. What, then, was the effect of placing the 182 hectolitres in the same hold with the 400 consigned to the defendants? It may be conceded as a general rule that, as between vendor and vendee, when it is sought to compel a party to pay for goods which he has refused to accept, there can be no recovery unless the order has been strictly and literally fulfilled. The buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. *Benj. Sales*, § 1030. To the same effect are the cases cited by the plaintiff in error. With reference to quantity, however, the rule is less rigid where goods are ordered from a correspondent who is agent for buying them, (*Ireland v. Livingston*, L. R. 2 Q. B. 99; 36 Law J. Q. B. 50; L. R. 5 H. L. 395;) for the relation of vendor and vendee which finally results is preceded by the relation of principal and agent, and the agent in such a transaction is necessarily invested with some degree of discretion in making the purchase. See, also, *Johnston v. Kershaw*, L. R. 2 Exch. 82, 36 Law J. Exch. 44, and *Jefferson v. Querner*, 30 Law T. (N. S.) 867. It must be conceded, however, that the purchase and tender of 582 hectolitres, upon an order for 400, would involve a wider discretion than would be allowable under the special facts of this case, even as between principal and agent. In this case, however, the plaintiff's correspondent purchased for and invoiced to the defendants 400 hectolitres only, and that quantity was tendered. The remaining 182

hectolitres were not invoiced to the defendants, although the plaintiffs proposed that the defendants might have them if they chose to take them. The 400 hectolitres of nuts unquestionably became the property of the defendants when purchased in Brazil, for they were purchased upon their order. By force of that order the plaintiffs became the defendants' agent, with authority to constitute an agent in Para for its execution; and the nuts were bought in virtue of the authority thus conferred.

The only question, therefore, would seem to be upon the effect of the shipping of the whole lot of 582 hectolitres in one hold, although upon separate invoices, and to different consignees. It was shown that this was the usual method of shipping, especially when the orders were small. There was no effort to establish a custom of this kind, but simply to show that this was the usual and ordinary method pursued in the shipping trade. The defendants had a right to suppose these goods would be shipped in the usual manner, unless they directed otherwise, and that, although intermingled with others in the forward hold of the vessel for transportation, they would be separated at the place of delivery. The nuts in question were of the same quality; they were bought at different prices, but the evidence is clear that they were of uniform quality. The weight of American authority supports the proposition that, when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may serve as illustrations of this rule. Where, however, the property sold is part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply. *Benj. Sales*, 477-531, and cases there cited. The storage of oil in tanks and of grains in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities; and, while no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in conformity with the commercial usages of the country. A distinction is made between those cases where the act of separation is burdensome and expensive, or involves selection, and those where the article is uniform in bulk, and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. *Id.* 1030, note. See, also, *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Hutchison v. Com.*, 82 Pa. 472; *Wilkinson v. Stewart*, 85 Pa. 255; *Bretz v. Diehl*, 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

The case at bar bears no analogy whatever to *Stevenson v. Burgin*, 49 Pa. St. 44, for all that is decided by that case is that, in a contract for a fixed quantity of merchandise to be delivered on board a vessel, the purchaser is not bound to accept and pay for a larger quantity. The principle has no application to the evidence in this case. The case at bar bears a closer analogy to *Lockhart v. Bonsall*, 77 Pa. 53. In that case a tender of 5,000 barrels of oil was made by Lockhart to Bonsall out of a bulk of 5,981 barrels, contained in 118 bulk cars. As it was the duty of Bonsall to pump the oil from the cars into the tanks of the Anchor works, which had been designated as the place of delivery, it was held that Lockhart was not bound to set apart the precise quantity named in the contract before offering to deliver. So, here, the measuring of the nuts, and their removal from the vessel, was the work of the defendants, and as the article was uniform in bulk, selection was of no consequence, nor was the act in any sense burdensome or expensive; for, assuming that the whole bulk was to be measured, yet the expense attached to the whole, and each part-owner was liable to share it.

We are of opinion that, when the nuts were delivered on board the *Portuence* at Para, the title to 400-582 of the bulk belonged to the defendants, and that upon the arrival of the vessel at New York the tender of the 582 hectolitres from which the defendants were invited to take their share was a good delivery. The judgment is affirmed.

II. Subsequent Appropriation ²

1. IN GENERAL

COMMONWEALTH v. FLEMING.

(Supreme Court of Pennsylvania, 1889. 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763.)

The plaintiff in error, Joseph Fleming, being a wholesale liquor dealer, licensed and carrying on business in Allegheny county, sold and sent from his place of business, C. O. D., to Mercer county, where he had no license, liquors ordered by persons in the latter county. For this he was, at the court of quarter sessions of Mercer county, indicted, tried, convicted, and sentenced for selling liquor therein without a license. He now brings error.

GREEN, J.³ In the case of *Garbracht v. Com.*, 96 Pa. 449, 42 Am. Rep. 550, which was an indictment for selling liquor without license,

² For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 49, 50.

³ Part of the opinion is omitted.

we hold that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him." In that case the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier to be forwarded to its destination in Mercer county. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal held any license for the sale of liquor in Mercer county. This decision was not changed in the least upon a subsequent trial of the same defendant on a different state of facts, as reported in 1 Penny. 471. In the case now under consideration the liquor was sold upon orders sent by mail by the purchasers, living in Mercer county, to the defendant, who is a wholesale liquor dealer in Allegheny county. The goods were set apart at the defendant's place of business in Allegheny county, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer county, and by the carrier transported to Mercer county, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the Case of Garbracht, *supra*, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of Garbracht.

It is claimed, and it was so held by the court below, that, because the goods were marked "C. O. D.," the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of the delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so

far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liabilities to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the seller to the carrier; and whether the carrier receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods. Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to receive the goods.

This was the case in *Henderson v. Lauck*, 21 Pa. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser absolutely to pay the price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them over as against the seller is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package of the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim

the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, where the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the factum of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller.

The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is *Higgins v. Murray*, 73 N. Y. 252. There the defendant employed the plaintiff

to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with, and did not affect, his right to enforce the defendant's liability. In the course of the opinion, Chief Justice Church said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. * * * Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of, and for the benefit of, the defendant, (assuming that it was done in accordance with the directions,) it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. * * * As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In *Hutchinson on Carriers*, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable

to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty,—that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal status of the parties results that the seller has a remedy for the price of the goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them. * * * Reversed.

ANDREWS v. CHENEY.

(Supreme Court of New Hampshire, 1882. 62 N. H. 404.)

Assumpsit, to recover money paid for goods. Facts found by a referee. October 28, 1879, the plaintiff bought goods of the defendant and paid for them. The defendant did not have in stock the goods wanted, and the plaintiff selected the kind and quality desired from samples. The defendant agreed to have the goods at his store within two weeks, at which time the plaintiff was to call for them; if they were ready before that time the defendant agreed to notify him. Within the stipulated time the defendant got the goods into his store, set them apart by themselves, and marked them with the plaintiff's name. The goods, together with the store, were destroyed by fire November 21, 1879, the plaintiff not having called for them. The court ordered judgment for the defendant, and the plaintiff excepted.

CARPENTER, J. The property in the goods did not pass to the plaintiff by virtue of the contract, for they were not then ascertained, and may not have been in existence. The agreement on the part of the defendant was executory. He agreed to furnish goods corresponding to the samples selected by the plaintiff. If the goods, subsequently procured and set apart by the defendant, did not conform to the samples, the plaintiff had a right to reject them. It does not appear

that he waived that right. The defendant was not concluded by his selection; he might have sold or otherwise disposed of the particular articles set apart by him, and substituted others in their place. A contract of sale is not complete until the specific goods upon which it is to operate are agreed upon. Until that is done the contract is not a sale, but an agreement to sell goods of a particular description. It is performed on the part of the vendor by furnishing goods which answer the description. If, as in the case of a sale by sample, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific goods to the contract is made with the assent of both parties. *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 489; *Jenner v. Smith*, L. R. 4 C. P. 270; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Merchants' N. Bank v. Bangs*, 102 Mass. 291; *Black, Sales*, 122, 127; *Benj. Sales*, s. 358. If the plaintiff authorized the defendant to make the selection, the property immediately on the selection vested in the plaintiff. *Aldridge v. Johnson*, 7 E. & B. 885. It not appearing that the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant, and their destruction was his loss.

By the terms of the contract the defendant was to have the goods at his store within two weeks, at the end of which time, or sooner if notified that they were ready, the plaintiff was to call for them, and the defendant was to deliver them. Within the stipulated time the defendant procured the goods and had them ready for delivery. This was all the agreement required him to do, and all that he could do until the plaintiff came for them. The plaintiff's call being a condition precedent to the defendant's obligation to deliver, must be shown in order to entitle the plaintiff to treat the contract as rescinded and recover back the purchase-money.

It may be that the trial before the referee proceeded upon the mistaken theory that the rights of the parties were concluded by the destruction by fire of the particular goods selected by the defendant, and that the only question was upon whom the loss of those goods should fall. The plaintiff did not call for the goods before the fire; but whether he did after the fire does not appear, and may have been considered immaterial. The rights of the parties under the agreement were not affected by the destruction of the goods. If they were set apart without authority from the plaintiff, he still had the right to call for the goods he bargained for, and the defendant was bound to deliver them. Upon the defendant's neglect or refusal to deliver them upon request as well after as before the fire, the plaintiff might at his election rescind the contract and recover the purchase-money, or affirm it and recover for the breach. *Drew v. Claggett*, 39 N. H. 431; *Weeks v. Robie*, 42 N. H. 316; *Swazey v. Company*, 48 N. H. 200.

The case may be recommitted to the referee, if the plaintiff desires it, for the purpose of showing a call for the goods after the fire. If

recommitted, it will be open to the defendant to show that he was authorized by the plaintiff to select the goods. As the case stands the exceptions are overruled. Exceptions overruled.

2. APPROPRIATION BY ACT OF SELLER

SMITH v. EDWARDS.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 221, 30 N. E. 1017.)

Action by Frank W. Smith and James E. Stoughton, copartners doing business under the style of "Smith & Stoughton," of Abington, Mass., against John Edwards and Frank Edwards, copartners doing business under the style of "Edwards & Son," of Findlay, Ohio. From a judgment for plaintiffs, holding certain goods and chattels of the principal defendants in the possession of the Old Colony Railroad Company, as trustees, the latter excepts.

HOLMES, J. This case comes before us on the exception of the Old Colony Railroad Company to a ruling of the court below that it should be charged as trustee of the defendants. The defendants have been defaulted. The bill of exceptions purports to state the evidence introduced on the motion to charge the trustee, but does not disclose the findings of the judge. We assume them to have been the most favorable for the ruling which the bill of exceptions warrants. The defendants in Ohio ordered of the plaintiffs, who are manufacturers of boots and shoes in Massachusetts, through the plaintiffs' traveling salesman, certain calf and buff shoes, to be made according to a sample shown to the defendants. It was assumed at the argument, and we assume, that the contract bound the defendants, that there is no question under the statute of frauds, and that the shoes were made according to sample. They were forwarded over the Old Colony Railroad, we must assume, if it be material, at the defendants' expense, and were delivered to the defendants. This mode of forwarding undoubtedly was authorized by the contract. The defendants accepted the buff shoes, but refused to accept the calf shoes, and shipped the latter back to the plaintiffs by the same railroad. The plaintiffs refused to accept them, sued the defendants for the price of the shoes, and trusted the railroad company. The calf shoes mentioned are the goods for which the railroad company was charged.

It is argued for the trustees that, although the defendants were guilty of a breach of contract in refusing to accept the calf shoes, yet, as the shoes were not in existence at the date of the contract, they did not become the defendants' property until tendered to and accepted by the defendants, after they were made.

Of course, the title to the shoes could not be vested in the defendants without their consent. But, in the present state of the law, it does not need argument to show that a contract can be made in such a way as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract is made, without a subsequent acceptance by the buyer, if the contract commits the buyer in advance to the acceptance of goods determined by other marks. *Blanchard v. Cooke*, 144 Mass. 207, 227, 11 N. E. 83; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Rodman v. Guilford*, 112 Mass. 405, 407; *Brewer v. Railroad Co.*, 104 Mass. 593, 595; *Nichols v. Morse*, 100 Mass. 523; *Middlesex Co. v. Osgood*, 4 Gray, 447, 449; *Aldridge v. Johnson*, 7 El. & Bl. 885, 899.

In the case of goods to be manufactured, the seller, as he has to tender them generally, has the right to appropriate goods to the contract, so far that, if he tenders goods conformable to it, the buyer's refusal to accept them is a breach. The buyer cannot say that he would have accepted some other goods had they been tendered. When goods are to be manufactured and forwarded by a carrier to a buyer at a distance, the seller's delivery of such goods to the carrier, as bailee for the purchaser, passes the title. The seller cannot forward them until they are specified. The delivery is an overt dealing with the goods as those to which the contract applies, and puts them into a possession adverse to the seller. Although not strictly a delivery, it is an act having the legal effect of a true delivery, which, in common legal language, it is said to be. *Hallgarten v. Oldham*, 135 Mass. 1, 9, 46 Am. Rep. 433; *Orcutt v. Nelson*, 1 Gray, 536, 543; *Merchant v. Chapman*, 4 Allen, 362, 364; *Kline v. Baker*, 99 Mass. 253, 254. The act is required of the seller by the terms of the contract, and thus is assented to in advance by the buyer, on the condition that, as supposed, the goods answer the requirements of the contract. Therefore it is a binding appropriation of the goods to the contract, and passes the title, as we have said. *Putnam v. Tillotson*, 13 Metc. (Mass.) 517, 520; *Merchant v. Chapman*, 4 Allen, 362, 364; *Odell v. Railroad Co.*, 109 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252, 254; *Fragano v. Long*, 4 Barn. & C. 219; *Wait v. Baker*, 2 Exch. 1, 7.

The present case could be disposed of upon a narrower ground. It would be enough to say that, so far as we can see, the judge who heard the motion to charge the trustee was warranted in finding as a fact that the defendants authorized the plaintiffs to appropriate the shoes to the contract, even if the inference was not necessary as matter of law. The question always is what intent the parties have expressed, either in terms or by reasonable implication. *Anderson v. Morice*, L. R. 1 App. Cas. 713; *Navigation Co. v. De Mattos*, 32 Law J. Q. B. 322, 328, 33 Law J. Q. B. 214 Exceptions overruled.

BRIGHAM v. HIBBARD.

(Supreme Court of Oregon, 1896. 28 Or. 386, 43 Pac. 383.)

Action by John W. Brigham against George L. Hibbard. Judgment for plaintiff. Defendant appeals.

BEAN, C. J. This is an action brought by a manufacturer of boots and shoes in Boston, Mass., to recover for goods sold and delivered to the defendant. The defendant admits the delivery of the goods, but denies the sale, claiming that he gave an order for certain goods, to be manufactured and shipped from Boston, to one Wetmore, —an agent to solicit orders for plaintiff,—for which he was to pay \$503, but that the goods sent did not correspond with the order; that he examined them immediately after their receipt, and, finding that they did not conform to the order, notified Wetmore, who was in Portland at the time, that he would not accept the goods, and that, by an agreement between him and Wetmore, he retained the possession of them, to be sold on plaintiff's account. Judgment of the court below was in favor of plaintiff, and defendant appeals. There are numerous assignments of error in the record, but, for convenience, they may be grouped under two principal heads: First, error of the court in ruling—both in admitting testimony and instructing the jury—that, if the goods delivered to the defendant were of the kind and quality ordered, plaintiff could recover without proof of an actual acceptance by the defendant; second, error in refusing to allow defendant to detail the entire conversation between him and Wetmore at the time, or soon after, the goods were examined.

The first assignment of error is based on the contention that, in an action for goods sold and delivered, the plaintiff must not only prove a sale and delivery, but an actual acceptance by the vendee. We do not so understand the law. When it is sought to give validity to a contract void under the statute of frauds, there must not only be a delivery, but an actual receipt and acceptance of the goods by the buyer. *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Remick v. Sandford*, 120 Mass. 309. But, where the contract itself is valid, a delivery, pursuant to its terms, at the place and in the manner agreed upon, if the goods conform to the contract, will sustain an action for goods sold and delivered, without any formal acceptance by the buyer. *Schneider v. Railroad Co.*, 20 Or. 172, 25 Pac. 391; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555; *Nichols v. Morse*, 100 Mass. 523; *Kelsea v. Manufacturing Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272; *Benj. Sales* (6th Ed.) §§ 699, 765; *Tied. Sales*, § 112. The buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them,

and thereby rescind the contract; but this right does not prevent the title from passing, nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract. Tied. Sales, § 112.

The next assignment of error is not well taken, because it does not appear that Wetmore had authority to cancel the contract between plaintiff and defendant, or substitute a new one, or to bind the plaintiff by any agreement in reference to the future disposition of the goods. He was a traveling agent and solicitor of orders for his principal, but such authority did not give him power to rescind or change the contract after the receipt of the goods by defendant. *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Stilwell v. Insurance Co.*, 72 N. Y. 385. In this connection the defendant was permitted to give evidence tending to show that the goods did not conform to the samples, and were not of the kind and quality ordered, and that immediately after their receipt he notified Wetmore of that fact, and refused to accept the goods, and the court held, and so instructed the jury, that if the goods were not of the kind and quality ordered, and immediately after the discovery of that fact the defendant tendered them back to Wetmore, and gave him notice that they were subject to plaintiff's order, such facts would be a sufficient rescission of the contract, and prevent a recovery in this action, and this was as favorable to the defendant as he could reasonably expect, under the showing as to Wetmore's authority to bind the plaintiff. The notice to Wetmore by defendant that he declined to accept the goods because they did not conform to the order was perhaps material, as part of the *res gestæ*, and as an act on his part explaining and qualifying his conduct in allowing the goods to remain in his store. *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461. But it was not within the scope of Wetmore's agency to make a new contract for the plaintiff in reference to such goods.

Finding no error in the record, the judgment of the court below must be affirmed.

NEW ENGLAND DRESSED MEAT & WOOL CO. v. STANDARD WORSTED CO.

(Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.)

Action by the New England Dressed Meat & Wool Company against the Standard Worsted Company. Judgment for plaintiff, and defendant excepts.

KNOWLTON, J.* The plaintiff seeks to recover only upon the first and third counts of the amended declaration, which set forth a claim

* Part of the opinion is omitted.

for the price of goods sold. As the case was submitted to the jury, a verdict could not be rendered for the plaintiff unless it was proved that the title passed to the defendant. The contract of sale covered certain specific property, namely, the fine combed wool which the plaintiff had on hand when the contract was made, and also such fine combed wool as the plaintiff should manufacture within the next 30 days; the whole to be paid for at 40 cents per pound. The present action concerns only a part of the wool subsequently manufactured, and the principal question in the case is whether the title passed before the action was brought.

What was necessary to give the contract effect upon the wool to be produced so as to change the ownership from the plaintiff to the defendant? The plaintiff was a manufacturer of wool, and it is clear that of the quantity of wool of different kinds in its possession none would pass to the defendant until something occurred to designate it as that covered by the contract. The parties contemplated, as their contract shows, that the plaintiff, who was to manufacture the wool, should, in connection with the work of manufacturing it, separate it from the mass of wool then in its possession, and determine its weight, so that it would appear to be the property called for by the contract; and its price would be ascertained. A learned writer states the law to be as follows: "In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority no title passes until that is done, so as to enable the vendor to recover the price, even for goods 'bargained and sold.'" Benj. Sales (6th Am. Ed.) 308. This doctrine is well established in Massachusetts, and, while the decisions are not uniform, it is a rule which prevails generally in this country as well as in England. *Scudder v. Worster*, 11 Cush. 573; *Weld v. Cutler*, 2 Gray, 195; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Ropes v. Lane*, 9 Allen, 502; *Keeler v. Goodwin*, 111 Mass. 490; *Morse v. Sherman*, 106 Mass. 430-432; *Nichols v. Morse*, 100 Mass. 523; *Turner v. Langdon*, 112 Mass. 265; *The Elgee Cotton Cases*, 22 Wall. 180-187, 22 L. Ed. 863; *Hatch v. Oil Co.*, 100 U. S. 124-134, 25 L. Ed. 554; *Morrison v. Dingley*, 63 Me. 553; *Bailey v. Smith*, 43 N. H. 141; *Haldeman v. Duncan*, 51 Pa. 66; *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119; *Woods v. McGee*, 7 Ohio, 127, pt. 2, 30 Am. Dec. 220; *Browning v. Hamilton*, 42 Ala. 484; *Bank v. Gillette*, 90 Ind. 268, 46 Am. Rep. 222; *Ferguson v. Bank*, 14 Bush (Ky.) 555; *Baldwin v. McKay*, 41 Miss. 358; *Upham v. Dodd*, 24 Ark. 545; *Courtright v. Leonard*, 11 Iowa, 32; *McLaughlin v. Piatti*, 27 Cal. 452-463.

We think that this rule is applicable to the present case. The regular process of manufacture which was necessary to bring the property within the contract would leave it a part of the larger mass in the possession of the plaintiff. According to the uncontradicted testimony, as the wool was manufactured it was conducted into bins by

a spout, and in the absence of some special action, taken for the purpose, there would be nothing to distinguish the wool made on one day from that made on the next day. The defendant requested the judge to instruct the jury as follows: "In order to recover on either the first, second, or third counts of its amended declaration the plaintiff must prove exactly 5,014 pounds of F. C. wool was separated into a body by itself, not mixed with or a part of any greater quantity of wool of a different grade, or with a greater quantity of F. C. wool, at the time the defendant was entitled to receive the wool the subject of the contract. In other words, the plaintiff, under the first three counts of the amended declaration, must show that the title to 5,014 pounds of F. C. wool passed to the defendant, and the title could not so pass until and unless that exact quantity of F. C. wool was made a distinct and separate portion by itself." The judge adopted this instruction, and said he would give it, omitting the words "exactly" and "exact." The instruction was not given in the words in which it was written, and the defendant contends that, considering the whole charge together, it was not given in substance or according to its meaning.

We do not deem it necessary to determine the correctness of this contention. The defendant concedes that some parts of the charge correctly stated its position. The fair interpretation of the request is "that the wool subject to the contract"—that is, the identical wool manufactured during the 30 days—must have been separated from the other wool of the plaintiff, so that it could be identified, in order to entitle the plaintiff to recover. We think the presiding justice intended to present to the jury the question raised by this request, and we also think that there was no evidence in the case to warrant a finding for the plaintiff upon it. As we understand the testimony, which is reported in full in the bill of exceptions, the plaintiff, in manufacturing the wool, weighed it as it went into the bins, so that the weight of the product of each day was known. The wool produced within the 30 days was weighed in the ordinary course of manufacture, and in that way the plaintiff knows how many pounds are covered by the contract. When the plaintiff undertook to deliver or to set apart for the defendant the balance of the wool covered by the contract remaining after the previous delivery, it shipped 6,223 pounds instead of 5,014 pounds, the balance of the amount which was produced within the 30 days. The defendant was not bound to take any wool except that manufactured within the 30 days, and, unless the plaintiff, whose duty it was to separate that from its other property, separated it so that it could be identified, the title to it never passed. We find no statement from any witness indicating that it was so separated. Apparently nothing was done under the contract to determine what wool belonged to the defendant. Taking the weights as the wool was manufactured did not enable the plaintiff to determine what portion of the contents of the bins was made at one time and what at another.

The first request of the defendant was for a ruling that on the evi-

dence the plaintiff could not recover on the first, second, or third count of its amended declaration. We think the jury were erroneously permitted to find for the plaintiff. * * * Exceptions sustained.

III. Reservation of Right of Possession or Property *

WIGTON v. BOWLEY.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 252.)

Tort for the conversion of 112 barrels of flour. Answer, a general denial. The case was submitted to the superior court, and, after judgment for the defendants, to this court, on appeal, upon agreed facts, in substance as follows:

COLT, J. Upon the agreed facts, the court below was justified in finding that the property in the flour was transferred to Fenno, the purchaser, when it was delivered for transportation to the railroad company in Michigan.

It appears that Fenno, having obtained from the plaintiffs the price asked for their flour delivered on board the cars, ordered a car-load at the price named, and authorized the plaintiffs to draw on him for the amount at ten days' sight, at the same time giving references to other parties as to his pecuniary standing. The plaintiffs took time to satisfy themselves as to his responsibility, and then delivered the flour on board the cars, directed to Fenno at Boston, and consigned to him. The receipt given by the railroad, sometimes called the shipping receipt or bill of lading, was taken in his name. These facts sufficiently show that the plaintiffs did not intend to retain their hold on the property, after it was taken by the carrier, as security for the payment of the price.

In the sale of specific chattels, an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title, if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. *Merchants' National Bank v. Bangs*, 102 Mass. 291. If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs. *Foster v. Ropes*, 111 Mass. 10. *Upton v. Sturbridge*

* For discussion of principles, see Tiffany, *Sales* (2d Ed.) §§ 51-53.

Mills, 111 Mass. 446. Where there is conflicting evidence as to intention, the question is for the jury. It cannot be disposed of as matter of law, unless the evidence will justify a finding but one way. *National Bank of Cairo v. Crocker*, 111 Mass. 163. *National Bank of Chicago v. Bayley*, 115 Mass. 228. *Alderman v. Eastern Railroad*, 115 Mass. 233.

The plaintiffs are proprietors of flouring mills in Hart, Michigan; and, on October 18, 1878, they received from Henry Fenno, who was then doing business in Boston, a letter asking for the price per car-load of their flour delivered on board the cars. On October 28, the plaintiffs sent to Fenno the figures requested; and, on October 31, Fenno ordered of the plaintiffs a car-load of the flour at the price named, authorized them to draw on him for the amount at ten days' sight, and referred them to persons with whom he had dealt. The plaintiffs, having obtained satisfactory information from the persons indicated as to Fenno's pecuniary standing, on November 13, 1878, loaded a car with the flour ordered, directed and consigned to Fenno at Boston; and, at the same time, they drew on Fenno as directed. The draft and the bill of lading for the flour, in which Fenno was named as consignee, were sent to a bank in Boston, with the instruction to deliver the bill of lading to Fenno, if the draft was accepted. The draft was never accepted, and the bill of lading was never delivered. There is no evidence to show that it was ever presented to Fenno for acceptance.

On December 5, 1878, Fenno executed to the defendants an order on the freight agent of the Boston and Albany Railroad Company to deliver to the defendants the flour in question; and the defendants paid the full purchase price of the flour to Fenno. The defendants presented the order to the freight agent of said company, and he delivered the flour to them, according to the usage of that and other railroad corporations, without exacting the production of the bill of lading. On December 9, 1878, the bill of lading and the draft were returned to the plaintiffs by the bank. The flour so delivered to the defendants is the same flour which the plaintiffs had consigned to Fenno. The plaintiffs have never received anything in payment or part payment thereof. Fenno failed immediately after he executed the order to the defendants, and his testimony cannot be procured by either party.

If, upon the above facts and such inferences as a jury would be authorized to draw, the plaintiffs were entitled to recover, judgment was to be entered for them for \$518.56, and interest from the date of the writ; otherwise, judgment for the defendants.

In the case at bar, the fact that the shipping receipt was not delivered to Fenno, but was sent with the draft to a bank in Boston, is not conclusive evidence, as against the rights of the consignee, that the plaintiffs intended not to part with the title. It was no part of the contract of sale. It was given in the name of Fenno, and could not

be transferred by the plaintiffs so as to change title in the property without his indorsement. What passed between the plaintiffs and the bank in Boston, not communicated to Fenno, cannot affect his rights.

It is not shown that the acceptance or payment of the draft was a condition precedent to a change of title; and the finding of the court below cannot be disturbed. Judgment affirmed.

MOORS v. WYMAN.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 60, 15 N. E. 104.)

Bill in equity by Joseph B. Moors against Ferdinand A. Wyman and others. Two firms doing business as F. Shaw & Bros. made a voluntary assignment to Wyman, for the benefit of creditors, and the bill was to settle the accounts of the assignee. The further facts sufficiently appear in the opinion.

HOLMES, J. This is a bill in equity, brought by a creditor of the Boston firm of F. Shaw & Bros., consisting of Fayette Shaw and Brackley Shaw, against that firm, against another firm in Vanceboro, Maine, of the same name, consisting of the above-named Shaws and Thaxter Shaw, and against Ferdinand A. Wyman, to whom both firms have made voluntary assignments for the benefit of creditors. As the objections to the jurisdiction are now waived, and as the assets in controversy have been converted into money, and a large part of the plaintiff's claim has been paid, since the filing of the bill, leaving only certain items of the account in dispute, only such of the facts need be stated as are necessary in order to settle these disputed items. The plaintiff, Moors, made advances to the Boston firm in several ways:

First. Under what is called the loan account agreement, by indorsing their notes, etc., in Boston, taking as security bills of parcels of specified hides, which the Vanceboro firm were tanning for the Boston firm, and which were delivered by the Boston firm to and held by Thaxter Shaw as agent for the plaintiff, with the consent of the Vanceboro firm. The Vanceboro firm agreed that the cost to Moors should not exceed four cents per pound, and in fact all charges for tanning were paid by the Boston firm to the Vanceboro firm. By the Boston firm's agreement, Moors had power, in case of default, or if in his opinion the collateral did not afford a margin of 25 per cent. above the amount unpaid, to sell at public or private sale, without notice; and it was further agreed that all collateral security held by Moors for the Boston firm's account, whether under that contract or otherwise, might be taken and applied as general security for all existing or subsequent indebtedness. This account has been paid off in great part since the filing of the bill.

Second. The plaintiff issued to the Boston firm letters of credit on Morton, Rose & Co., of London, under which the firm bought hides, taking bills of lading to the plaintiff's order by agreement; the plaintiff having a lien on the goods, bills of lading, and policies of insurance, with authority to take possession and dispose of them at his discretion, for his security or reimbursement. Before the defendant's failure, the practice was for the plaintiff to indorse the bill of lading to the Boston firm, they signing a contract by which they received the hides as his agents, and agreed as such agents to send the hides to specified tanneries of theirs in Maine or New York, and to deliver to the plaintiff, upon demand, the identical leather into which the hides should be manufactured; the plaintiff not to be chargeable with any expense thereon. The intention of the agreement was stated to be to protect and preserve unimpaired the plaintiff's lien. After the failure, the plaintiff took possession of the hides as they arrived and sold them through reputable brokers for fair prices. The plaintiff has paid Morton, Rose & Co. the whole amount due them.

Third. The plaintiff obtained letters of credit for the Boston firm, drawn upon the Bank of Montreal by the agents of the bank, the Boston firm giving the bank an agreement similar to that with Moors last mentioned, with authority to the agents to take possession of the goods, and dispose of the same at discretion, and to charge all expenses, including commissions for sale and guaranty. Upon arrival of the hides, the agents of the bank indorsed the bills of lading to Moors, who, before the failure, indorsed them to the Boston firm under the same form of agreement as stated with regard to bills of lading under the Morton, Rose & Co. credit. The hides arriving after the failure were sold by him in like manner as before stated. The plaintiff has paid the bank the whole amount due to it.

It is argued for the Shaws that Moors received the indorsed bills of lading as agent of the Bank of Montreal, and that, however this may be, he has lost his right in all hides received by him under any bills of lading before the failure and turned over to the Boston firm as Moors' agents. But upon the record before us, we must take it that Moors received the hides, as the master's report implies that he did, on his own behalf. The agents of the bank looked to him for payment, and they have been paid. The bank had a title, whether absolute or qualified does not matter. See *De Wolf v. Gardner*, 12 Cush. 19, 59 Am. Dec. 165; *Forbes v. Railroad Co.*, 133 Mass. 154, 156; *Moors v. Kidder*, 106 N. Y. 37, 12 N. E. 818. Moors got this title by indorsement, and had a similar title originally, under the Morton, Rose & Co. bills of lading. His indorsement of the bills of lading to the Boston firm as his agents did not release this title. It was not a conveyance in form, and being made only for the purpose of enabling him to get the goods from the carriers, it was not a conveyance in substance or effect. See *Moors v. Kidder*, *ubi supra*; *Pratt v. Parkman*, 24 Pick. 42, 47; *Low v. De Wolf*, 8 Pick. 101, 107.

Neither did Moors lose his rights by giving the custody of the hides to the Shaws. They expressly agreed to hold as Moors' agents, and the general rule is perfectly well settled that the custody of a servant or of a mere agent to hold, is the possession of the master or principal. The only difficulties that have arisen have been due to the failure to distinguish accurately between such servants or agents and bailees who hold in their own name. *Hallgarten v. Oldham*, 135 Mass. 1, 9, 46 Am. Rep. 433. Or, in the case of pledges, between a delivery to the pledgor, for his own purposes, and intrusting him with the custody on behalf of the pledgee. *Kellogg v. Thompson*, 142 Mass. 76, 79, 6 N. E. 860. It might be argued that policy requires an exception to be made in favor of a bona fide purchaser for value from the general owner having the seeming possession of the goods as against a person whose security depended upon possession, and who had made the owner his custodian. But the Massachusetts cases tend to show that there is no such exception, in the absence of fraud. *Kellogg v. Thompson*, *Moors v. Kidder*, *ubi supra*; *Thacher v. Moors*, 134 Mass. 156, 165. At all events, there is nothing in the case to warrant our making one, even assuming that all parties before us are not concluded by the express agreement of the Shaws that the plaintiff's rights should remain. There is nothing in Wyman's position, as to proceeds in his hands, to diminish the rights which Moors had as against the Shaws; nor do his counsel argue that there is, so far as the question of possession is concerned.

The plaintiff has charged a commission of 5 per cent. on the hides sold by him, of which rather more than nine-tenths in value were imported under the Morton, Rose & Co. credit, the rest under that of the Bank of Montreal. The defendants deny his right to sell at private sale, and more particularly deny his right to charge any commission. We see no reason to doubt that the sale was lawful, and we are of opinion that the plaintiff should be allowed the sum which the master has found to be a reasonable compensation for the services, actually rendered by him, viz., two and one-half per cent. upon the gross sales, or \$5,080.65. The argument is strong that the loan account agreement, authorizing the plaintiff to apply all security to any indebtedness, imports an application in the manner and with the incidents there set forth, one of which was a charge of 2½ per cent. commission. All of the facts tend to the conclusion that a commission was to be charged. See, further, *Varnum v. Meserve*, 8 Allen, 158, 161.

It is admitted that there was due to the plaintiff on April 1, 1886, the sum of \$61,448.87 as found by the master. Adding the commission, the amount is \$66,529.52. By the master's findings, the defendant Wyman had in his hands, on the same date, \$89,533.34 proceeds of the plaintiff's security, or more than enough to pay what remains due, unless Wyman has a right to make certain charges which have been disallowed by the master. The first of these is a charge of 5 per cent. commission for sales made by Wyman. The master found

no agreement to that effect with the plaintiff, and rightly disallowed the charge. There is no reason why a debtor selling his own property to pay his debt should charge his creditor for doing so, and there is no reason why Wyman, in this respect, should stand in a better position than the Shaws. So far as the sales were made by agreement, the agreement excluded the right to make a charge. It is at least a fair inference that he made the other sales, if rightful, on the same footing.

Mr. Wyman's second charge is for tanning the hides which were on hand at the time of filing the bill, and which were mostly in the process of tanning, and could not be removed without serious injury. The master finds that there was no agreement or understanding between the plaintiff and Wyman that the latter should make any charge to the plaintiff for tanning. One item of \$43,298.64 was charged for leather which Wyman agreed to deliver to purchasers, as Moors' agent, and the proceeds of which in money he further agreed to deliver to Moors as soon as received, his contract expressly stating that Moors was not to be chargeable with any expenses incurred thereon. It will be seen that this agreement follows the form of the original contract of the Boston firm as to letter of credit hides, with such charge only as was required by the fact that Wyman received the purchase money for the leather in the first place. We think that the master was plainly right in disallowing this charge.

The only remaining item is \$36,710.43, being the difference between four cents a pound allowed by the master, and seven cents, the actual cost of tanning. Of this sum, according to the statement of Wyman's counsel, \$13,972.89 was for tanning loan account hides, for which the Vanceboro firm agreed that the cost to Moors should not be more than four cents. In the absence of agreement to the contrary, the master was warranted in finding that as to these hides at least Wyman proceeded on the terms of the contract, and could not charge more than four cents, if entitled to charge anything. There was nothing to preclude such a finding in the fact that Moors took possession of the bill of lading hides arriving after the failure. He had a right to do so, and, if he had not had, we could not say, as matter of law or fact, that his doing so imported a repudiation of the distinct contract relations as to the loan account hides in the tannery.

There is left, then, only \$22,737.54 in dispute, which might be deducted from the amount in Wyman's hands, and yet leave enough to pay the plaintiff. As to this sum we think that the allowance of four cents was sufficiently favorable to the defendants, and, if it were necessary to go further, in order to secure the plaintiff's rights, we should have some difficulty in finding a warrant for making any allowance at all. The hides were bill of lading hides, which by the original agreement were to be manufactured into leather without any expense to Moors or the bank. Such bill of lading hides as Wyman did make

an agreement about he undertook to deal with in the same way. On these facts alone the argument against his right to charge is strong. But, further, bearing in mind that these hides were to be tanned and held by the Boston firm, and that the Vanceboro firm had nothing to do with them, if that fact be material, it is to be observed that when the holder of the equity of redemption in property, or of a kindred interest, makes improvements upon it necessary to preserve it from destruction or great loss, he may be presumed to make such improvements in the interest of the equity, for the purpose of at least diminishing the claim upon his general funds not pledged, and, if possible, of obtaining a surplus. Undoubtedly it was for the interest of the creditors of the Boston firm that the hides should be tanned, rather than be spoiled. The principle is the converse of that which allows a mortgagee to charge for reasonable improvements. *Merriam v. Goss*, 139 Mass. 77, 82, 28 N. E. 449.

There are obvious objections to allowing the holder of the equity to create a lien superior to an existing mortgage. Even if the Vanceboro firm were concerned, it would not necessarily change our opinion upon the matter, in view of the circumstances of this case. Decree accordingly.

FRAUD AND RETENTION OF POSSESSION

I. Contract or Sale Induced by Fraud ¹

ADAM, MELDRUM & ANDERSON CO. v. STEWART.

(Supreme Court of Indiana, 1901. 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240.)

See post, p. 136, for a report of the case.

CUNDY v. LINDSAY.

(House of Lords, 1878. L. R. 3 App. Cas. 459.)

See post, p. 139, for a report of the case.

II. Remedies of Defrauded Party ²

1. BONA FIDE PURCHASERS FROM FRAUDULENT BUYER

SCHLOSS v. FELTUS.

(Supreme Court of Michigan, 1895. 103 Mich. 525, 61 N. W. 797, 36 L. R. A. 161.)

On rehearing. For original opinion, see 55 N. W. 1010, 96 Mich. 619, 36 L. R. A. 161.

McGRATH, C. J.³ Upon rehearing, after the fullest consideration, we find no reason to change the former opinion. 96 Mich. 619, 55 N. W. 1010, 36 L. R. A. 161. The principal question in the case is whether a naked, pre-existing debt is such a consideration or payment for the transfer of a stock of goods as will defeat replevin by the original vendor, who sets up fraud in the purchase from him. The rule, as laid down in 16 Am. & Eng. Enc. Law, 837, is that a pre-existing debt is not such a consideration as will sustain the plea of "bona fide purchaser for value," except in the case of negotiable paper. The cases cited will be found to fully support the text. Other cases will be found collected in Tied. Sales, § 329; Hil. Sales, p.

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 54, 55.

² For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 56, 57.

³ The dissenting opinion of Montgomery, J., is omitted.

382; and Benj. Sales (6th Ed.) p. 448. Mr. Tiedeman says: "Although there are a few cases which maintain that a pre-existing debt is a sufficient consideration, the better opinion is that it is not sufficient, because there is no parting with value in reliance upon the title to the goods thus acquired, and that an attaching or other creditor is not a bona fide purchaser."

Some of the cases would seem to make a distinction between a receipt of property in payment of a pre-existing indebtedness, and a receipt in satisfaction or discharge of such debt; that a satisfaction can only result from an agreement to that effect, but payment operates as a discharge or satisfaction of the debt, and in either case the failure of title revives the debt. The case of *Dickerson v. Tillinghast*, 4 Paige (N. Y.) 215, 25 Am. Dec. 528, was a bill to foreclose a mortgage given by Catherine Tillinghast. Defendant, Charles T., was the son of the mortgagor, who received a conveyance of the premises from his mother, subsequent to the mortgage, the consideration for which was a debt due the son from his mother. *Baze v. Arper*, 6 Minn. 220 (Gil. 142), was a case of where the only consideration for a deed of land was a precedent debt. *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482, was a case of where a grocer had assigned his stock of goods to indemnify the assignee against liability as indorser for the assignor. No distinction is made between a conveyance in payment of a debt and one given as security therefor. This court has, in a number of cases, recognized the rule as applicable to conveyance as security for a pre-existing debt. *Boxheimer v. Gunn*, 24 Mich. 372; *Kohl v. Lynn*, 34 Mich. 360; *McGraw v. Solomon*, 83 Mich. 442, 47 N. W. 345; *Edson v. Hudson*, 83 Mich. 450, 47 N. W. 347.

But it is insisted that under our authorities this is the limit of the rule, and *Bostwick v. Dodge* (decided in 1844) 1 Doug. (Mich.) 413, 41 Am. Dec. 584, *Outhwite v. Porter* (1865) 13 Mich. 533, and *Hanold v. Kays* (1887) 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835, are cited to support that contention. In *Bostwick v. Dodge*, Bostwick gave his note to one Hooper, who indorsed it over to Dodge in payment of a debt due from Hooper to Dodge. The court in that case say: "It had been long and uniformly held that the extinguishment of a pre-existing debt was as valid and sufficient a consideration for the transfer of a negotiable instrument as the payment of money, or the delivery of any species of property whatever. That the rule is one of great convenience and necessity, even, to a commercial community, is too obvious to require illustration, and its adoption in no way contravenes the principles of natural justice." In *Outhwite v. Porter*, Porter held notes made by one Cantine. Outhwite bought out Cantine's business, and Porter surrendered Cantines' notes, taking from Outhwite the latter's notes. Although *Bostwick v. Dodge* is cited, the court held that Cantine had been released; that it was a case of novation by the substitution of one

debtor for another, by the assent of the three parties. In *Hanold v. Kays*, K. was indorser upon certain outstanding notes made by one O. In consideration of K.'s agreement to take up and pay said notes, O. conveyed certain land to K. The court say that K. had paid the notes before notice, and that such payment formed a sufficient consideration for the deed. It had been repeatedly held by this court that an agreement to pay—a mere executory contract—is not a sufficient consideration, but that payment actually and in good faith made before notice entitled the vendee to protection, and such is the universal rule. In that case, however, the court uses language unnecessary for the determination of that case, and regards *Bostwick v. Dodge* as authority for saying that one who takes a deed of land in absolute payment of a debt due him is a bona fide holder for value.

From an examination of the authorities, however, it will clearly appear that the rule laid down in *Bostwick v. Dodge* is an exception to the general rule, and the difficulty with the *Hanold* Case is that it substitutes a recognized exception for the rule. In *Currie v. Misa*, L. R. 10 Exch. 153, Lord Coleridge, in a dissenting opinion,—his contention being that the exception did not apply to a mere check in the hands of a holder for value,—says: "It is too late to dispute that a pre-existing debt, due to the transferee of a bill, entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules,—an extraordinary protection given to such holder on grounds of commercial policy only, and in order to favor the unrestricted use, as currency, of negotiable instruments." In *Whistler v. Förster*, 14 C. B. (N. S.) 248, it is said: "The general rule of law is undoubted that no one can transfer a better title than he himself possesses. To this there are some exceptions, one of which arises out of the rule of the law as to negotiable instruments. These, being part of the currency, are subject to the same rule as money; and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder." In *Bay v. Coddington*, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268, the exception is recognized, but the court refused to apply the principle to that case as made. In *Dickerson v. Tillinghast*, *supra*, the case of *Bay v. Coddington* was referred to as sustaining the rule adopted; but, although *Bay v. Coddington* has been overruled, the rule of *Dickerson v. Tillinghast* remains the law of that state. The cases in support of the rule excepting commercial paper are collected in 2 Rand. Com. Paper, §§ 461, 465, and the subject is referred to in 2 Am. & Eng. Enc. Law, 392.

There are authorities which refuse to recognize either rule or exception, but the rule is supported by the great weight of authority. The serious conflict is as to the recognition of the exception in favor of commercial paper. Our own court, in *Bostwick v. Dodge*, has

determined that question; and the rule there laid down must be regarded as an exception to the general rule of law, and cannot be carried beyond the necessity that gave rise to it. The doctrine of that case has no application to the transfer of a nonnegotiable instrument. In *Whistler v. Forster*, supra, the court refused to apply it, for the reason that the paper was not indorsed until after notice. The term "bona fide purchaser" is borrowed from equity jurisprudence, and must be interpreted accordingly. Mr. Pomeroy, in his *Equity Jurisprudence*, says: "There must be actual payment before notice, or what in law is tantamount to actual payment,—a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable, legal obligation." Sections 747, 749–751.

It is well settled by our own court that one must pay as well as purchase. *Thomas v. Stone* (1843) Walk. Ch. 117; *Dixon v. Hill* (1858) 5 Mich. 404; *Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Stone v. Welling*, 14 Mich. 514, *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200. In *Blanchard v. Tyler*, one Hearsé claimed to be a bona fide purchaser. He paid nothing to Tyler. Tyler was owing him about \$7.50, which was to apply on the purchase, and he gave a nonnegotiable note for \$600, less \$7.50. The note was to be paid by turning out other notes, and this was not done until some time afterwards. The court held that H. was not a bona fide purchaser; that whatever he paid was after notice, and such payment was made in his own wrong. In *Stone v. Welling*, Stone filed a bill to foreclose a mortgage given by Hart, making Welling (a subsequent purchaser) a party defendant. The consideration for the deed from Hart to Welling was an agreement by the latter to give up to the former certain judgments and notes held by Welling against Hart, and to release the latter from an existing indebtedness. Mr. Justice Cooley, for the court, says: "But the question in this case is whether there was an actual payment of value for the land by Welling before notice of complainant's mortgage; and, to make the agreement amount to such a payment, it must at least have been one which Hart, at the time, could have enforced as a discharge against Welling & Root. The evidence shows that the agreement was wanting in the consideration agreed upon, since the land covered by the deed had previously been incumbered by the mortgage to complainant. There was no impediment, therefore, to Welling & Root proceeding in the collection of their demands against Hart & Williams, if the facts had all been made known to them."

In *Chadwick v. Broadwell* (1873) 27 Mich. 6, the logs had been transferred to Chadwick in payment of the balance due on the stumpage contract between Chadwick and Lester; but the court intimated that Chadwick had paid nothing, and that, had the purchase failed by reason of the fact that Mrs. Broadwell insisted upon

her legal rights, the debt against Lester remained. In *Battershall v. Stephens* (1876) 34 Mich. 68, 73, Mr. Justice Graves refers approvingly to the rule that in case the consideration is merely a past indebtedness, the purchaser is not entitled to be regarded as a bona fide purchaser. In *Boxheimer v. Gunn*, 24 Mich. 372, Mr. Justice Christiancy uses this language: "The defendant's answer, as we have already seen, alleges the conveyance to Sutton to have been made to him merely as a security for a precedent debt, and does not claim that any other consideration was paid or agreed to be paid, or that the form of the debt was changed, or that he had relinquished any remedy in consideration of the conveyances, or, finally, that his own position would not be equally as good to-day, if the conveyance should turn out to be utterly valueless, as it was before the conveyance. He has not, therefore, by his answer, placed himself in the position of a bona fide purchaser or incumbrancer for the value, with equities superior to those of the complainant, though it should be admitted that he acted in good faith, and without notice;" citing *Stone v. Welling*, 14 Mich. 514.

It certainly could not have been intended, in view of the authorities referred to, that an unexecuted agreement to pay would constitute a bona fide purchaser. I do not desire to be understood as saying that an agreement to extend the time of payment may not be such a consideration as will support a mortgage given for a pre-existing debt, nor that the release of security, or perhaps the surrender of evidences of indebtedness, may not be a sufficient present consideration to uphold a conveyance made in payment of a pre-existing debt. In the present case there was no change in the form of the debt. It is urged that the vendor had other property out of which the purchaser might have made his debt. It is not necessary to pass upon that question. The transfer was made October 1st, and on the 4th of the same month the vendee was notified of plaintiff's claim. There is no evidence of any change in the debtor's circumstances respecting such other property, if he had any, between those dates. Under the rule laid down in *Stone v. Welling*, the creditor could then have avoided the discharge or release of the debt, to the extent of the failure of title. As to the rule that the purchaser is entitled to protection only to the extent of payments actually made at the time of the notice, see, also, *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312, and *Sheldon v. Holmes*, 58 Mich. 138, 24 N. W. 795.

We did not deem it necessary in the former opinion to discuss other questions raised by the record, and do not now. The judgment must be reversed, and a new trial ordered.

ADAM, MELDRUM & ANDERSON CO. v. STEWART.

(Supreme Court of Indiana, 1901. 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240.)

Action by the Adam, Meldrum & Anderson Company against Thomas Stewart and others. From a judgment for defendants, plaintiff appeals.

HADLEY, J. Appellant, a corporation, as a vendor, brought replevin to recover of the mortgagee of its vendee certain merchandise alleged to have been fraudulently purchased. The venue was changed to the Wabash circuit court. Judgment for the appellees. No question arises upon the pleadings. The only error assigned is the overruling of appellant's motion for a new trial, which challenges the sufficiency of the evidence to support the finding, and certain rulings of the court on proffered testimony.

The material undisputed facts follow: Appellee Stewart on the 26th day of November, 1897, was engaged as a retail dry goods merchant in Huntington, Ind. For several years he had bought most of his goods of appellant, engaged in the wholesale dry goods business in Buffalo, N. Y. February 18, 1895, when he was establishing his business at Huntington, he borrowed \$5,000 of his wife, Isa A. Stewart, for which he executed to her on that date his note, bearing 6 per cent. interest from date until paid. Soon after the beginning of his business at Huntington, Stewart opened an account with appellant for goods, which at the close of 1896 he had suffered to run against him for about \$4,000. At this time he had never submitted, or been requested to submit, to appellant a statement of his assets and liabilities; but, upon the receipt from appellant of a semi-annual statement of his account, Stewart voluntarily, in explanation of his default in payments, on January 7, 1897, made in writing a statement showing \$10,500 capital over liabilities, which at best was erroneous by the amount he owed his wife, and \$2,000 to the First National Bank of Huntington. Appellant's credit man testified that, believing and relying upon the truth of the statement, he extended indulgence, and thereafter, beginning on February 13, 1897, and ending October 27, 1897, in the usual course of trade, the house sold Stewart by a traveling salesman, 43 additional bills, ranging from \$6.83 to \$602, and aggregating \$6,115. In the same period Stewart made appellant divers payments on account, amounting to \$3,397, and returned goods not ordered, on several occasions, amounting to \$189, and, as testified by Stewart, and which seems not to have been denied, on November 15, 1897, paid appellant, on the goods sued for, \$257. On June 5, 1897, Stewart again wrote appellant, "Our liabilities, outside of yourselves, are less than ever, and are simply nominal." In the autumn of 1897 appellant urged Stewart to secure his indebtedness, and on November 26, 1897, he execut-

ed three notes,—one to his wife for \$5,831, being a renewal of her former note, with interest accrued to date; one to Breen for \$500, being for past and then contracted indebtedness; and one to Isenhauer for \$85 for rent then due; each of said three notes made payable in bank at one day after date,—and at the same time executed to appellee Schuckman, as trustee, a chattel mortgage on his entire stock in trade to secure said three notes and one payable to the First National Bank of Huntington, of previous date, for \$1,500. Schuckman took immediate possession under the mortgage. On the following day (November 27th) appellant brought this suit against Schuckman, trustee, and Stewart, to recover all goods sold to Stewart after the erroneous statement of January 7, 1897.

These facts, it is argued, show (1) that Stewart got possession of the goods delivered to him by the appellant between the dates of January 7, and November 26, 1897, by such active fraud as empowered appellant to rescind the contracts of sale and retake the goods; and (2) that they do not show that the beneficiaries of the chattel mortgage to Schuckman, trustee, are innocent purchasers for value, within the meaning of the law. The first of these propositions becomes immaterial if the second should be determined against appellant's contention. No claim is made that either of the debts secured by the mortgagor is invalid, or that either of the mortgage beneficiaries had any notice or knowledge of the false representations made by Stewart to appellant.

It may be stated as a general rule that a mortgage made to secure an antecedent debt will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. In such cases equity will restore to the defrauded vendor that which is rightfully his, when in the doing it only takes from the mortgagee the advantage of his security, which has cost him nothing, and leaves to him unimpaired all his rights under the original contract. *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Adams v. Vanderbeck*, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24, 62 Am. St. Rep. 497; *Cobbey, Repl.* § 286, and cases cited; *Tiff. Sales*, p. 122, and cases cited; *Burdick, Sales*, p. 169. But a mortgage executed by a fraudulent purchaser upon goods that have come into his possession in the usual course of trade, and over which he has continued to exercise dominion and give forth the appearance of ownership by mixing and exposing them to sales with his other goods, will be held valid as to a mortgagee who, in consideration of the mortgage, and without notice of the fraud, has extended the time of payment of his debt, or assumed any new or additional obligation. *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Investment Co. v. Harris*, 142 Ind. 226, 238, 40 N. E. 1072, 41 N. E. 451; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; *Mears v. Waples*, 3 Houst. (Del.) 581; *Shufeldt v. Pease*, 16 Wis. 659; *Dock Co. v. Foster*, 48 Ill. 507; *Cobbey, Repl.* § 415; *Tied. Sales*, § 327.

The facts of the case are that in consideration of the mortgage Mrs. Stewart accepted a renewal of her note, and extended the time of payment of her debt; Eisenhauer accepted a note, and extended the time of payment of his past-due account; Breen accepted a note for \$500, payable in bank one day after date, \$250 of which was for a past-due account, and \$250 for legal services then contracted for, to be then and thereafter rendered. These persons, having no notice of Stewart's fraud in the purchase of the goods, if there was any, and having all surrendered the right to sue their debtor for a definite period, and Breen having assumed a new obligation, must be classed as innocent purchasers for value, within the rule above stated. The fact that the mortgage to the First National Bank of Huntington rested solely upon a pre-existing debt cannot affect the decision of the case. Schuckman's possession of the property as the trustee of Mrs. Stewart, Eisenhauer, and Breen is rightful, and replevin will not lie against one legally in possession, in favor of one who has no superior right.

The judgment of the circuit court is right for another reason: It is a familiar rule that a contract induced by fraud is not void, but voidable only, at the option of the party defrauded. It rests solely with the defrauded party to say whether or not the contract shall stand, and until repudiated by him it is valid. He may abide the contract and seek redress in damages, or, if he acts within a reasonable time after discovery of the fraud, he may rescind the contract and reclaim his property. But if he elects to rescind there must be a complete restoration of everything of value the party defrauded has received under the contract. He will not be permitted to undo the contract, while retaining the money or other valuable thing delivered him under its terms. *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *Haase v. Mitchell*, 58 Ind. 213; *Baluc v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Tiff. Sales*, p. 119; *Tied. Sales*, § 163. It is shown by the record that Stewart testified that on November 15, 1897, 11 days before the execution of the mortgage to Schuckman, trustee, and 9 months after the first purchase of goods subsequent to the January 7, 1897, statement of assets and liabilities, complained of, he paid appellant on the goods sued for \$257. It does not appear that the testimony was denied by appellant, and it must be accepted as true. The sum thus paid was not returned or tendered to appellees before the commencement of this suit, which of itself is fatal to appellant's right of recovery.

The propositions arising upon the admission and rejection of testimony relate exclusively to the question of Stewart's fraud, which we have found unnecessary to consider. Judgment affirmed.

2. FRAUDULENT IMPERSONATION

CUNDY v. LINDSAY.

(House of Lords, 1878. L. R. 3 App. Cas. 459.)

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood street, Cheapside. It had two side windows opening into Wood street, but, though the entrance was from Little Love Lane, it was by him constantly described as 37 Wood street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37 Wood street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood street on one side, could only be reached from the entrance in 5 Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood street, but at number 123 Wood street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods thus fraudulently obtained from Messrs. Lindsay to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were bona fide purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the mayor's court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central criminal court, and convicted and sentenced.

Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37 Wood street—were they the same goods as those

bought by the defendants—and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants. 1 Q. B. Div. 348. On appeal this decision was reversed, and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay. 2 Q. B. Div. 96. This appeal was then brought.

CAIRNS, L. Ch. My lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My lords, in discharging that duty your lordships can do no more than apply rigorously the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My lords, the question, therefore, in the present case, as your lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the

ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract. There is nothing else which could have passed the property. The second observation is this: Your lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done; the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally; everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my lords, discharging that duty and answering that inquiry, what the jurors have found is, in substance, this: It is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—~~was~~ acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to and intended for, not himself, but the firm of Blenkiron & Co. Now, my lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron &

Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my lords, is this: that your lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My lords, I therefore move your lordships that this appeal be dismissed with costs, and the judgment of the court of appeal affirmed.

Judgment appealed from affirmed, and appeal dismissed, with costs.

III. Fraud on Creditors ⁴

MARTIN v. MARSHALL.

(Supreme Court of Kansas, 1894. 54 Kan. 147, 37 Pac. 977.)

In December, 1888, and early in January, 1889, Edward Pelletier and George Pelletier were engaged in the retail grocery business in Concordia under the firm name and style of Pelletier Bros., and were largely indebted to wholesale and jobbing houses, and much of this indebtedness was past due. They were being urged by their creditors to pay the demands owing by them. Neither of them owned any property subject to execution, other than this stock of groceries. Early in January, 1889, when pressed by their creditors, Pelletier Bros. made various promises to pay money on their demands, but failed to do so. On January 3, 1889, they made a pretended sale of all their stock of goods to John Martin and Medore Martin, partners as Medore Martin & Co., receiving, as the Pelletiers and Martins state, \$200 in cash, a deed to some property in Concordia, which was at the time mortgaged, and a note for \$500, then in litigation in the courts of Arkansas. Attachments were levied by some of their creditors upon this stock of goods, and judgments were obtained against Pelletier Bros. The goods were sold, and the money received from the sale of the goods applied in part payment of the judgments and costs. On January 22, 1889, this action was brought by Medore Martin & Co. against the sheriff, Edward Marshall, to recover \$5,000

⁴ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 58, 59.

damages. The case was tried by court with a jury. The jury returned a verdict for the defendant, and judgment was entered thereon. The plaintiffs bring the case here.

HORTON, C. J. (after stating the facts). Martin & Co. claim that on the 3d day of January, 1889, they purchased of Pelletier Bros., at Concordia, a stock of groceries, fixtures, etc., for \$2,500. Edward Marshall, as sheriff of Cloud county, levied on the property under attachments in his hands from creditors of the Pelletier Bros. The question tried in the court below was as to the validity of the sale claimed to have been made by Pelletier Bros. to the plaintiffs. It appears that on the afternoon of January 3, 1889, there was a pretended sale of the property, evidenced by an agreement in writing signed by the parties. This agreement provided that the Pelletier Bros. were to accept as part payment for the stock of goods, etc., the south half of block 3 in Gaylord & Matthews' addition in the city of Concordia, subject to a mortgage of \$800, and a note given by Preston L. Williams for \$400. After an inventory of the goods had been taken the balance due upon the inventory was to be paid in cash. The inventory was completed in the forenoon of January 4, 1889. It shows that the goods, at cost price, were worth about \$2,700. The Pelletiers agreed to take \$2,500. The lots in Concordia were to be taken by them at the value of \$1,800, subject to the mortgage of \$800, and the Williams note, with interest, as \$500. The balance of \$200 was paid in cash.

The lots in Concordia were only worth \$700 or \$800,—not more than the mortgage. The note of \$500 was not only clouded with litigation, but one of the Pelletier brothers knew that the maker alleged in his defense that it was obtained fraudulently. The Pelletiers, at the time of making a sale of the stock, were heavily indebted to their creditors, who were pressing them for payment, and the evidence clearly shows that the sale was made by them with the fraudulent intent to delay and defraud their creditors. That good faith is essential to support the sale cannot be questioned. If Martin & Co. knew of the fraudulent intent of the Pelletiers, and bought with that knowledge, they cannot claim to be bona fide purchasers. "Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to knowledge of the ultimate fact." *Phillips v. Reitz*, 16 Kan. 396; *Trim. Sales*, § 329; *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171. There is ample evidence in the record tending to show that the property turned over to the Pelletiers by Martin & Co. as part payment for the stock of goods, etc., was not worth one-half the sum for which it was accepted. Martin & Co. did not allow adequate prices for the property purchased, and in view of all the evidence the jury were justified in finding that they did not act in good faith. *McDonald v. Gaunt*, 30 Kan. 693, 2 Pac. 871; *Lewis v. Hughes*, 49 Kan. 23, 30 Pac. 177. The

trial court charged the jury sufficiently upon all the material propositions of law involved in the case.

Various objections are presented in the briefs concerning the reception and rejection of evidence. We have examined all of these questions carefully, but find no material error contained therein. The invoice offered was competent evidence, and ought to have been received, but witnesses were permitted to describe the goods referred to, and to state the amount of the invoice. Further, it appears that the Pelletier Bros. finally agreed to sell the stock in bulk for \$2,500. The invoice, therefore, was not important. It is not necessary to comment upon the other matters referred to in the briefs. The judgment of the district court will be affirmed. All the justices concurring.

IV. How far Delivery is Essential to Transfer Property Against Creditors and Purchasers ⁵

KIRVEN v. PINCKNEY.

(Supreme Court of South Carolina, 1896. 47 S. C. 229, 25 S. E. 202.)

Action by James N. Kirven against Henry L. Pinckney and another to recover a certain mare. There was a judgment for plaintiff and defendants appeal.

POPE, J.⁶ * * * It seems that the plaintiff made an agreement with one Mr. Henry Tupper, of Charleston, in this state, which was formally embodied in this written agreement, to wit: "October 2d, 1894. This is to certify that J. N. Kirven and Henry Tupper have traded the following mares, Brown Girl and Daisy, J. N. Kirven to give H. Tupper Brown Girl and \$25.00 for Daisy. J. N. Kirven to pay freight on both mares. H. Tupper to raise the colt that Brown Girl is with, to the age of six months, and then give said colt to J. N. Kirven; and, if the colt is not sound at that time, H. Tupper is to pay J. N. Kirven \$100.00. Brown Girl is by Highland Red out of Worth by Black Chief. Brown Girl is in foal by Melville Chief (2353), due to foal on or about 7th March, 1895. In witness whereof, I have hereunto set my hand and seal, this 4th day of Sept., 1894. Henry Tupper [L. S.]"

On the 8th day of October, 1894, this plaintiff shipped, by rail, Brown Girl to the order of Henry Tupper, and advised Tupper to send to him Daisy on the night of the same day. A letter from Tupper to Kirven, dated 8th October, 1894, admits the receipt from Kirven of a telegram to this effect on that same day, and expresses his regret at not being able to ship Daisy on that night, explaining his

⁵ For discussion of principles, see Tiffany, Sales (2d Ed.) § 60.

⁶ Part of the opinion is omitted.

inability by reason of the mare being up town, but stating she should be shipped the next day. On the 9th day of October, 1894, when Tupper sent to the railroad authorities for the mare Brown Girl, his messenger returned with the information that she was sick. Thereupon he employed a veterinary surgeon (one McInness) to do what he could for her, but she died while in the car at Charleston. Mr. Tupper promptly notified Mr. Kirven of his loss, and advised Kirven to bring suit against the railroad for damages. Mr. Kirven, however, sent him a check for the \$25, dated 8th October, 1894, and insisted that Brown Girl was Mr. Tupper's loss. Mr. Tupper, however, denied this, and returned the check to Mr. Kirven.

This describes the attitude of the parties to each other. Mr. Tupper sold the mare Daisy to the defendant Henry L. Pinckney, Jr.; and Mr. Pinckney placed her in the keeping of the defendant Manly Boykin. The two last reside in Sumter county, where the mare Daisy is kept, who, by the way, has dropped a colt; so that now Mr. Kirven brings his suit for claim and delivery against Mr. Pinckney and Mr. Boykin for both the mare Daisy and her colt, but Mr. Tupper is not made a party to this suit.

One of the defenses set up by the defendant is that Daisy never became the property of Mr. Kirven; that the agreement between Mr. Kirven and Mr. Tupper was only for an exchange of mares, but was never executed; and that the only remedy Mr. Kirven had was to sue Tupper for a breach of his contract; and that Kirven never owned or had a lien on the mare Daisy, and therefore the defendant Pinckney had a perfect right to buy her as he did. We cannot regard this as a sale of the mare Daisy to Mr. Kirven. The contract shows that it was to be an exchange of one mare for the other, with \$25 as "boot." This exchange was never consummated. If the contract was breached by Tupper, Kirven had his remedy by bringing his action against Tupper for such breach of his contract. We cannot view this contract as executed by its terms, so that Brown Girl was Tupper's property, and Daisy was the property of Kirven. Each had to deliver his mare to the other, respectively, before the rights of third parties could be affected. Whatever remedy Mr. Kirven has is against Mr. Tupper. The defendant, by his second request to charge, made this point; and the circuit judge refused to so charge. This was error. The defendant, on the same ground, sought a nonsuit. This was refused by the circuit judge, and thereby the circuit judge was again in error.

We must therefore reverse the judgment, and direct that the complaint be dismissed. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remitted to the circuit court, with directions to that court to dismiss the complaint.

PARRY v. LIBBEY.

(Supreme Judicial Court of Massachusetts, 1896. 166 Mass. 112, 44 N. E. 124.)

Action by Parry Bros. & Glidden against Fred C. Libbey. There was a finding for plaintiffs, and defendant brings exceptions.

It appeared that, after the alleged sale of the bricks in suit to plaintiffs, Sawyer Bros., the vendors, went into insolvency. Their assignee produced the purchase-money note given by plaintiffs, and testified that he expected to realize on it as soon as the litigation was settled.

HOLMES, J. This is an action for the conversion of certain bricks, and comes before us on the defendant's exceptions. The alleged conversion was a seizure of the bricks under a mortgage purporting to cover bricks manufactured subsequently to its date, and the plaintiffs claimed title by delivery to them as bona fide purchasers for value under a bill of sale before the seizure by the defendant. The bricks in question were made after the mortgage. The main questions raised by the exceptions are whether the judge ought to have ruled that there was no delivery of the bricks to the plaintiffs, and also that no consideration was given by them for the bill of sale.

The bill of sale was an instrument under seal, and purported to convey to the plaintiffs "a certain lot of bricks, being bricks now left in a certain kiln situated in the southerly end of brickshed at South Clinton, Massachusetts, containing about two hundred thousand hard bricks, also about one hundred thousand light hard bricks; being piled partly in northern end of said shed, and partly outside of shed." These words, on their face, purport to convey all the bricks in the two distinct piles mentioned, and, there being no denial that the piles were distinct, parol evidence was not admissible to cut down their effect. *Harper v. Ross*, 10 Allen, 332. Testimony was admitted that it was agreed orally at the time of the sale that the vendor should have the right to deliver, out of the bricks, a certain amount,—it seems, about 10,000 or 15,000 bricks,—that he wished to deliver to others. But, apart from the objection just stated, the judge who tried the case was warranted in finding that this amounted to no more than a license to the vendor to take a certain amount from the purchaser's piles in case he should wish to do so thereafter.

The goods sold thus being specified, the parties went to the brickyard, and Mr. Parry says, in terms, that he took possession of them. He counted the bricks, and made arrangements with one of the vendors, personally, to ship the bricks as he should send word. Portions of the bricks were shipped from time to time, in pursuance of the arrangement. The land where the bricks stood seems to have belonged to a third person, but nothing appears in the evidence which diminishes the effect of the facts stated. On these facts the judge was warranted in finding a delivery sufficient to pass the title to all the bricks, as against third persons. *Hobbs v. Carr*, 127 Mass. 532; *Ropes v.*

Lane, 9 Allen, 502, 510; *Id.*, 11 Allen, 591; *Hardy v. Potter*, 10 Gray, 89; *Riddle v. Varnum*, 20 Pick. 280.

A question of evidence may be disposed of before passing from this subject. The defendant offered to prove that the sellers of the bricks, after the delivery to the plaintiffs, spoke of the bricks as theirs, solicited orders for them, and delivered what they sold. The judge excluded evidence of such words or acts, so far as they were not brought home to the knowledge of the plaintiffs. The argument for the defendant assumes that the vendors were left in possession. If they were not, the evidence was incompetent. *Horrigan v. Wright*, 4 Allen, 514; *Roberts v. Medbery*, 132 Mass. 100. Whether the vendors were in possession, or not, constituted, for this purpose, one of those preliminary matters of fact which are to be found by the judge who tried the case, and on which his adverse finding is conclusive. *Com. v. Bishop*, 165 Mass. 148, 152, 42 N. E. 560; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92.

A note for \$1,000 was given by the plaintiffs in payment for the bricks, on which \$300 were paid by the plaintiffs after the seizure by the defendant, and which now is in the hands of the assignee. The money actually paid is part of the entire price. We do not perceive on what ground we should deny the plaintiffs' right to be considered purchasers for value. We are not called on to consider how the case would have stood had the assignee undertaken to avoid the sale as a fraud on creditors. The assignee holds the note, and seemingly affirms the sale. The right set up by the defendant was not a right to avoid the sale as a fraud on creditors, but a right to take possession under his mortgage. That right was ended as soon as the delivery was made to Parry. As against the mortgagee the note was a valuable consideration.

The other exceptions are not argued. Exceptions overruled.

ILLEGALITY

I. Sales Prohibited by Common Law ¹

MATERNE v. HORWITZ.

(Court of Appeals of New York, 1886. 101 N. Y. 469, 5 N. E. 331.)

Action to recover damages for breach of contract to accept and receive 400 cases of domestic sardines with "fancy labels" similar to imported goods. From a judgment of the general term of the superior court of the city of New York (50 N. Y. Super. Ct. 41), affirming a judgment dismissing the complaint, the plaintiff appeals.

PER CURIAM. It must be assumed, we think, that the defendants knew, when the agreement was made, that they intended to purchase sardines of the kind that were tendered to them, and that the plaintiffs understood that the defendants knew it. It is also inferable that the defendants entered into the agreement, to the knowledge of the plaintiffs, for the purpose of selling the goods to others in the condition in which they were when delivered. It is also evident that the labels were used to deceive the consumers, and not the contractors, and to obtain higher prices for the sardines. The plaintiffs procured and furnished the deceptive labels after binding themselves by contract to do so, and this was done for an unlawful purpose, with a view of furnishing goods for the market in a condition calculated to deceive the consumers who might purchase them. It is therefore apparent that it was part of the contract that an unlawful object was intended to which both parties were cognizant, and that it was designed by them, under the contract to commit a fraud, and thus promote an illegal purpose by deceiving other parties. In such a case the courts will not aid either party in carrying out a fraudulent purpose.

Under the Penal Code, § 438, it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. The contract in question would seem to be covered by this provision of the Code; but as the Penal Code did not go into effect till May 1, 1882, and this contract was made June 30, 1881, the section cited has, we think, no bearing on the question presented. To carry out this contract would be contrary to public policy, and in such a case, as we have seen, the court will not aid either party.

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 63, 64.

The case was properly disposed of upon the ground first stated, which is fully considered and elaborated, in the opinion of general term, by Sedgwick, J., in which we concur. Judgment should be affirmed.

GRAVES v. JOHNSON.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446.)

Action by Chester H. Graves and others against Walter B. Johnson for the price of liquors sold to defendant by plaintiffs. Judgment for plaintiffs, and defendant excepts.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine against the laws of that state. These are all the material facts reported, but these findings we must assume were warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Mr. Pollock, that some of the English cases which have gone furthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. *Holman v. Johnson*, 1 Cowp. 341; *Poll. Cont.* (5th Ed.) 308. See, also, *McIntyre v. Parks*, 3 Metc. (Mass.) 207.

The assertion of that right, however, no doubt was in the interest of English commerce, (*Pellecat v. Angell*, 2 Crompt. M. & R. 311, 313,) and has not escaped criticism, (*Story, Confl. Laws*, §§ 254, 257, note; 3 Kent, Comm. 265, 266; *Whart. Confl. Laws*, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws (see *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 Barn. & C. 93, 95, 98; *Harris v. Runnels*, 12 How. 79, 83, 84, 13 L. Ed. 901).

Of course, it would be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break

the laws of a foreign country would be invalid. Poll. Cont. (5th Ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme. *Waymell v. Reed*, 5 Term R. 599; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Hull v. Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law. He must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. *Hayes v. Hyde Park*, 153 Mass. 514-516, 27 N. E. 522, 12 L. R. A. 249.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale that the seller merely knows that the buyer intends to resell in violation even of the domestic law. *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hodgson v. Temple*, 5 Taunt. 181. So of the law of another state. *McIntyre v. Parks*, 3 Metc. (Mass.) 207; *Sortwell v. Hughes*, 1 Curt. 244, Fed. Cas. No. 13,177; *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205. *Dater v. Earl*, 3 Gray, 482, is a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way, (*Suit v. Woodhall*, 113 Mass. 391, 395; *Finch v. Mansfield*, 97 Mass. 89, 92;) and the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law, (*Pearce v. Brooks*, L. R. 1 Exch. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.)

However this may be, it is decided that when a sale of intoxicating liquor in another state has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. *Webster v. Munger*, 8 Gray, 584; *Orcutt v. Nelson*, 1 Gray, 536, 541; *Hubbell v. Flint*, 13 Gray, 277, 279; *Adams v. Coulliard*, 102 Mass. 167, 172, 173. Even in *Green v. Collins* and *Hill v. Spear*, the decision in *Webster v. Munger* seems to be approved. See, also, *Langton v. Hughes*, 1 Maule & S. 593; *M'Kinnell v. Robinson*, 3 Mees. & W. 434, 441; *White v. Buss*, 3 Cush. 448. If the sale would not have been made

but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale, on the principles explained in *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249, and *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. The overt act of selling, which otherwise would be too remote from the apprehended result,—an unlawful sale by some one else,—would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended.

We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine,—its tendency to produce it,—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient. Compare *Com. v. Churchill*, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice that he is paid for his act. See *Com. v. Harrington*, 3 Pick. 26.

The ground of the decision in *Webster v. Munger* is that contracts like the present are void. If the contract had been valid, it would have been enforced. *Dater v. Earl*, 3 Gray, 482. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied whether the law to be violated is that of the state of the contract or of another (see *Tracy v. Talmage*, 14 N. Y. 162, 213, 67 Am. Dec. 132) at least the right to contract with a view to a breach of the laws of another state of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong shared by a large part of our own citizens. (*Territt v. Bartlett*, 21 Vt. 184, 188, 189.) In the opinion of a majority of the court, this case is governed by *Webster v. Munger*, and we be-

lieve that it would have been decided as we decide it if the action had been brought in Maine instead of here. *Banchor v. Mansel*, 47 Me. 58. Exceptions sustained.

II. Sales Prohibited by Statute²

KELLEY v. COSGROVE.

(Supreme Court of Iowa, 1891. 83 Iowa, 229, 48 N. W. 979, 17 L. R. A. 779.)

Action of replevin for a horse. The petition shows that the plaintiffs were the owners of the horse in question, and that on Sunday, the 11th day of August, 1889, they traded or exchanged said horse with defendant for a certain mare, the exchange of possession being made on that day; that on the next day Thomas Kelley, as the agent of the plaintiffs, tendered back the mare, and demanded a return of the horse, for the reason that the exchange or trade was made on Sunday, and therefore void, which the defendant refused; and that the exchange of horses was not a work of charity or necessity. The answer of the defendant admits that he went to the defendant's place of business on Sunday, and then and there made the exchange of horses referred to in plaintiff's petition, and that said exchange was complete in every respect and particular, plaintiffs taking the mare referred to in the petition, and defendant taking the horse therein referred to; that said exchange was completed in all respects on the day and date above mentioned. Defendant also admits "that the said trade and transaction was not an act or work of charity or necessity," and that a re-exchange of horses was demanded and refused. Upon this state of the proceedings as to the issue presented the plaintiffs moved the court for judgment in their favor for the possession of the horse and for costs on the ground that the exchange of horses was a Sunday contract, and plaintiffs had tendered back the mare, and demanded a return of the horse, which was refused. The court overruled the motion and the plaintiffs elected to stand therein. The plaintiffs appealed.

GRANGER, J.³ 1. These parties met and exchanged horses on Sunday. The transaction was unlawful. The record does not disclose that either party suffered a loss in the transaction. It was an exchange of a horse for a horse, and there is no averment or claim that they are not of equal value. The parties were alike in the wrong, and the law makes the same presumptions for and against each. If this exchange had been made on a secular day, there could be no pretense of the plaintiffs' right of recovery. The question is therefore

² For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 65.

³ The statement of facts is abridged and part of the opinion omitted.

one of a naked legal right, not to relief from the consequences of a violated law, but to invoke the aid of a violated law to relieve them from what would otherwise be legal. It is well settled that the law will not aid the parties to enforce a contract made on Sunday. Thus if A. sells his horse to B. on Sunday on a credit the law will not aid him to enforce a payment. It will sooner permit him to suffer the loss. Much less will it, if he sells his horse on Sunday, and receives in money the full value thereof, assist him on Monday to return the money and regain his horse. This supposed case as against appellants is not stronger than the one at bar. It is not important that we should discuss cases in which one party has a superior advantage, and is seeking to take the property of another without compensation, or to make rich gains by means of the Sunday law. Without now committing ourselves to any theory in such cases, it is easy to imagine conditions and wrongs for which it would be difficult to believe the legislature ever designed the law as a shield. But it is not difficult to believe that the legislature never intended that the law against Sabbath-breaking should be a means of enabling parties, because its offenders, to escape that which but for the offense would be legal and just.

Appellants have made an extended collection of authorities bearing on the enforcement and application of Sunday laws to different facts, but no case is brought to our attention that in its facts is like this. Appellants criticise the holding in *Gunderson v. Richardson*, 56 Iowa, 56, 8 N. W. 683, 41 Am. Rep. 81, and intimate that it should be overruled if it militates against their position in this case. It was held in that case that there could be no recovery for fraudulent representations made as an inducement to enter into a contract on Sunday. It is true that the holding and reasoning in that case is inconsistent with appellants' position in this; but it does not follow that an adverse holding in that case would support appellants' view in this. In that case the defendant pleads the violation of the Sunday law as a defense or shield against a charge of fraud, and this court sustained the plea upon the authority of *Pike v. King*, 16 Iowa, 49, and *Kinney v. McDermott*, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191; citing also *Smith v. Bean*, 15 N. H. 577. The abstract contains a parenthetical statement that the petition originally contained allegations of warranty and false representations, "which allegations were stricken and withdrawn by plaintiff," showing an intent to divest the record of such a claim. This case rests, then, upon this proposition: If a party, in violation of the law, parts with his property on Sunday, will the law for that reason alone aid him to regain it? Without hesitation we answer, "No."

The late case of *Foster v. Wooten*, 67 Miss. 540, 7 South. 501, while it sustains our answer to the query, is of much broader significance, and we cite it only to the extent of its bearing on the question before us. It is there said: "Grant, then, that the sale was made on Sunday, what is the rule of law on such state of facts? Nothing more

than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them. That is the extent of the rule. It cannot be reasonably asserted that the seller of the stock, L. D. Lewis, could have made any maintainable appeal to any court for the annulment of the trade and the recovery of the stock. Equally in fault with the buyer, A. F. Foster, the law would decline to afford him any countenance, leaving him just where it found him, and where his own act had placed him. With what show of reason can it be contended that the attaching creditor of L. D. Lewis could take any step for the assertion of any claim to the stock thus wrongfully sold on Sunday, which L. D. Lewis himself could not take? But this whole question has been too long and too firmly settled to be now disturbed. Neither L. D. Lewis nor the attaching creditor could dispossess the Sunday purchaser or any purchaser under him. See *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357, and cases there cited." * * * Affirmed.

FOSS v. CUMMINGS.

(Supreme Court of Illinois, 1894. 149 Ill. 353, 36 N. E. 553.)

Assumpsit by S. D. Foss and others against R. F. Cummings and others. Defendants obtained judgment, which was affirmed by the appellate court. Plaintiffs appeal.

WILKIN, J.⁴ This is an action of assumpsit, begun in the circuit court of Cook county, by appellants against appellees. The declaration contained the common counts for goods sold and delivered, money lent, paid out, and expended, had and received, interest due, work and materials furnished, and money found due on settlement. * * * The action was in fact for money claimed by plaintiffs to have been paid out, and for commissions, storage, insurance, interest, and losses upon certain corn transactions in which they acted as the agents of the defendants. * * * By reference to volume 40, p. 523, of Appellate Court Reports, a statement of the facts can be found, and it will not be necessary to repeat them here. It will also appear that the transactions out of which plaintiffs' claim is alleged to have arisen were held to be unlawful, as growing out of a contract or combination between the defendants, and to which the plaintiffs were parties, to unnaturally enhance the price of corn in the market.

Counsel for appellants seem to understand that holding to apply only to sales, and not to purchases, or transactions growing out of them; and they insist that whereas their former declaration and account were for a balance due, after giving the defendants credit for the proceeds of certain sales, the declaration and bill of particulars upon which the last trial was had were for the recovery of advances,

⁴ Part of the opinion is omitted.

etc., on account of purchases, "without recognizing the sale of the corn or any part thereof, and without giving credit for the proceeds of its sales, or any part thereof, treating the corn so purchased in the possession of appellants as commission men and agents for appellees." In this way it is attempted to place plaintiffs in the position of maintaining a lawful claim, and avoid whatever illegality there may have been in the transactions between the parties as to sales. This led to an unusual method of introducing the evidence; for while it was stipulated that either party might read, from the transcript of the record certified to the appellate court from the former trial, "all or any part of the evidence offered by them, or either of them, at the former hearing and trial, * * * subject, however, to all objections that may be offered or urged against the admission thereof, said objections to have the same effect as if originally given by the witnesses being called upon the stand," still, counsel for plaintiffs insisted upon reading only so much of their former testimony as they understood to relate to purchases, and objected to the reading of all other parts thereof. The court permitted them to elect what portions they would read, but overruled the objection as to the reading of other parts of it. The result was that, piecemeal, by one party or the other, the material portions of the evidence introduced on the former trial were reoffered on this.

It is now insisted that the court below erred in allowing defendants to introduce so much of that testimony as pertained to sales of corn. They contend that, by the new declaration and bill of particulars, the issues were changed. The issues were formed on the allegations of the declaration, and not upon the copy of the account between the parties; but we are unable to see how the competency of the evidence objected to in any way depended upon the items in that account. Of course, the plaintiffs were not required to offer proof of claims not made by them, but the defendants certainly had a right to disprove those claims if they could. The testimony objected to tended to show, if it did not prove, that the purchases and sales were alike a part of an unlawful attempt to force the corn market. The evidence read by plaintiffs and that offered by the defendants did not tend to prove independent transactions, but parts of a single scheme.

We think the circuit court ruled properly in disallowing the objection. Moreover, we are unable to find, either in the opinion of the appellate court or the evidence in this record, any warrant whatever for the assumption that the transactions between these parties were lawful so far as they related to purchases, but unlawful as to sales. In the opinion of the court by Waterman, J., after referring to the evidence, both as to what was to be done in the way of purchases and sales, citing, with other testimony, that of Mr. Foss, one of plaintiffs, he says: "What, then, was this transaction? And, if not an attempt to corner the market, was it in any way an unlawful undertaking? It was clearly a combination to enhance the price of corn. The parties who entered into it had on hand, or had purchased, large quantities

of corn. It is not pretended that they had any use or need for more. Nevertheless, they entered into an agreement to purchase cash corn and May options, as the plaintiff Foss testifies, because, by buying up the cash corn, the market would advance. Other parties were also large holders of corn, and they were brought into the arrangement. A combination was made, not only to purchase corn, but to prevent the free selling thereof. All the immense amount of corn owned by these parties was put into the hands of the plaintiffs. They were to control all, and thus, by united holding, united purchases, and no sales, save such as should be for the benefit and the interest of all, the market was to be controlled, the price of a staple commodity, one of the prime necessities of life, enhanced, and it was expected great gains would be made by the parties to the combination, while he who had corn to buy for food would be compelled to pay, not the price of a free market, but the sum to which, by such combination,—such united holding and withholding,—the market might be forced.”

We are therefore not left merely to the presumption, arising from the judgment of affirmance by the appellate court, that it found the whole scheme to be unlawful, and that plaintiffs were parties to it, but it expressly so stated in its opinion. An attempt is made to maintain the position that there is no evidence whatever in the record to support this finding, but it has wholly failed. Not only does the testimony tend to do so, but, in our opinion, it clearly sustains the conclusion reached as announced in the foregoing quotation.

The only question, then, remaining for us to pass upon is, did the trial court err in its rulings upon propositions of law? Plaintiffs' attorneys submitted 23 lengthy statements in writing, and asked the court to hold them propositions of law applicable to the case, all of which were refused. Many of them contained no distinct legal propositions whatever; but it is only necessary for us to say that, if the proposition held at the request of the defendants correctly stated the law of the case, each of those asked by the plaintiffs were necessarily erroneous, and properly denied. The one held is in the following language: “The court holds, as a proposition of law applicable to this case, that if the corn known as ‘XX’ corn was purchased and sold by Foss, Strong & Company, and advances were made thereon, and storage and insurance were also paid and advanced by them thereon, in pursuance of and in the execution of an agreement, understanding, or combining by the defendants to advance and enhance the price of corn above what the market price thereof would have been if left free from manipulation by buying up the cash corn coming into the Chicago market, and by keeping back and from said Chicago market corn which would otherwise have been brought to said market for sale, and Foss, Strong & Co. were parties to, or assented to and aided in, such agreement, and acted in the premises as the brokers or commission men for said defendants, in pursuance of, and in execution of, such scheme to thus enhance the price of corn, then there can be no

recovery by the plaintiffs for losses they may have sustained in the purchase and sale of said corn, or for advances made or expenses incurred, or for commission for purchase and sale thereof."

This court is fully committed to the rule of law here announced. *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499. Our statute makes it a penal offense to "corner the market, or to attempt to do so," in relation to any grain or other commodity, and declares all contracts made for that purpose void. Rev. St. § 130, c. 38. We are unable to distinguish the combination between these parties, as found by the appellate court, from an attempt to corner the Chicago market in relation to corn. Practically, it is that, and nothing else. But, whether it is or not, it was an attempt to advance the price of corn beyond the natural market by a combination between the parties, and that the law condemns as against public right and void, and forbids the courts to lend their aid to those engaged therein. "All compacts between merchants, speculators, or any class of men to elevate or depress the market are injurious to the public interest and in restraint of trade. When such a purpose is apparent in a contract, it strikes the agreement with nullity. Such a combination of dealers is nothing less than a conspiracy against trade, entered into for selfish purposes, and tending to make the poor poorer, and the rich richer. Whether the design is to bring the price of any commodity to a point below its value in a fair and open market, or to raise it above its true worth, the illegality of the combination is the same. Such design will not be furthered by the courts, though there may be circumstances under which the object of such a contract does not sufficiently appear to expose the illegality. If the true character is known, the contract will be held void." 9 Am. & Eng. Enc. Law, p. 895, and cases cited. The case of *Arnot v. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, cited in the note, and the authorities referred to in the opinion in that case, fully sustain the text. It makes no difference that the agreement is only in partial restraint of trade. If the public is injuriously affected, (and that is necessarily so when the combination tends to increase the price of a commodity of general use,) it is illegal.

On the facts of this case as they must be accepted by us, the judgment of the circuit court, and its affirmance by the appellate court, are clearly right. The judgment of the latter court is affirmed. Affirmed.

III. Effect of Illegality ⁵

SINGER MFG. CO. v. DRAPER.

SAME v. LOONEY.

(Supreme Court of Tennessee, 1899. 103 Tenn. 262, 52 S. W. 879.)

Actions by the Singer Manufacturing Company against H. M. Draper and Mary Looney, respectively. Judgments for defendant in each case, and plaintiff appeals.

WILKES, J. These two suits are actions of replevin, and involve substantially the same questions of law. On the 13th of November, 1896, the Singer Manufacturing Company, through its local agent in Hawkins county, sold to H. M. Draper a sewing machine, and on the 21st of February, 1896, sold a machine to Mary Looney, the contracts in each case being in writing and the same; the company in each case retaining the title to the machines until paid for, together with a right to retake them on default of payment. Default was made on each machine after partial payments had been made, and replevin was brought before a justice of the peace for each, the machine in the Draper case being valued at \$50, and in the Looney case at \$40. The machines were taken out of the possession of the purchasers, and put into the possession of the company. On trial in the circuit court, the judge held that the company was not entitled to retake the machines, and gave judgment in the Draper case for \$50, the value of the machine, and \$19.50 damages for the detention; and in the Looney case for \$40, and \$2.50 damages for detention; and the company has appealed to this court, and assigned the same errors in each case.

The cases were heard upon an agreed statement of facts, and, among others not necessary to mention, is one that, when these sales were made, the company had not paid any license tax for 1896 to sell machines in Hawkins county, as required by statute, and had paid none for five or more years previous to that date. The learned circuit judge held that for this failure to comply with the law the company could not sue to enforce the contract, and could have no standing in the courts for any purpose whatever. The company assigns this holding as error. At the time these contracts were made, the act of 1895 (Acts 1895, c. 120) was in force. Section 65 of that act provides that the occupations and business transactions that should be deemed privileged would be enumerated in the revenue law, and should be taxed, and not pursued or done without license. The revenue act placed a tax upon dealers or agents selling sewing ma-

⁵ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 66-68.

chines. It has been held that such provisions are an express prohibition against persons pursuing or exercising any of such privileges without a license, and, if they do so, their acts are in violation of law, and all contracts for their enforcement or benefit are illegal and unenforceable. *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743.

This holding has been followed and repeated too often to require further citation. The courts will not enforce contracts made in open violation of law, and will give no relief, either by way of enforcing the contract or giving damages for its breach. It is said by the company, however, that it is not suing to enforce the contract, but to recover the machines, and this it has the right to do, even if the contract be void. The contract upon its face provides that, on default of payment, the company may retake the machines. To allow it to do so will, it is plain, be to enforce the contract. To allow it to do so would be to put a premium upon its violation of law. In other words, it is to permit it to make an illegal contract, receive part payment thereon, and then repudiate it and retake the property, and retain the amount paid. It may be remarked that the suits were commenced before a justice of the peace. One involves \$50 and the other less. The statute requires them to be heard upon equitable principles, in the same manner as in courts of chancery. Now, if we could hold (which we do not) that plaintiff could retake the machines as upon a repudiation of the contracts, it could only do so upon condition that it refund the amounts received upon the sales. This it has not done nor offered to do. It must be borne in mind that, as between the parties, the contract is not void, and the principle which prevents the plaintiff's recovery is that the courts will not lend their aid to enforce contracts and transactions made in fraud and violation of its laws, and which it has impliedly prohibited. Nor will it lend its aid to repudiate them in order to enable a party making them to reap a benefit therefrom, and this on grounds of public policy. The judgments are affirmed, with costs.

KNIGHTS v. BROWN.

BRIDGES v. BRIDGES.

(Supreme Judicial Court of Maine, 1900. 93 Me. 557, 45 Atl. 827.)

Action by Amelia D. Knights against Richard W. Brown and another, and by John E. Bridges against Albert Bridges. Nonsuit ordered in both cases, and plaintiffs except.

HASKELL, J.⁶ These two cases turn upon the construction of the same statute, and are therefore considered in one opinion.

⁶ The statement of facts is omitted.

The first is an action of assumpsit to recover the purchase money paid for a horse bought on Sunday. The plaintiff tendered a return of the horse for breach of warranty of soundness, which was refused, and sues for the price paid for it. The sale was on Sunday. The plaintiff was nonsuit, and has exception.

The second is an action on the case to recover damages sustained for negligently letting a carriage that was unsafe and unsuitable for the uses for which it had been hired. The hiring was on Sunday, and the damage suffered was on Sunday. The plaintiff was nonsuit, and has exception.

To both cases, section 20, c. 124, Rev. St., is interposed, as a defense. In reply, section 116, c. 82, Id., is invoked in the first case, and Acts 1895, c. 129, in the second case. The former statute, inherited from Massachusetts, was upon the erection of our state enacted in Acts 1821, c. 9, § 2. Among other things, it prohibits business, except works of charity or necessity, upon the Lord's Day. By a long line of decisions, this court has held that, by reason of that statute, a contract made on Sunday is void between the parties, and that the consideration therefor cannot be recovered back, and that a tort arising from such contract will not support an action for damages. *Towle v. Larabee*, 26 Me. 464; *Hilton v. Houghton*, 35 Me. 143; *Morton v. Glosster*, 46 Me. 520; *Bank v. Mayberry*, 48 Me. 198; *Pope v. Linn*, 50 Me. 83; *Tillock v. Webb*, 56 Me. 100; *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Plaisted v. Palmer*, 63 Me. 576; *Meador v. White*, 66 Me. 90, 22 Am. Rep. 551; *Mace v. Putnam*, 71 Me. 238; *Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794.

This act of 1821, was found, in practice to work a fraud, by allowing one party to a Sunday contract to retain his fruit of the transaction, and to give the other party none; so the legislature, in 1880 (Rev. St. c. 82, § 116), enacted that he who receives a valuable consideration for a contract made on Sunday shall not defend against it on that ground until he restores the consideration; that is, if he will repudiate the contract he must first restore his gains from it,—a wholesome doctrine, that will not allow a desecration of the Lord's Day to become a cheat.

In the first case at bar, the defendant sold a diseased horse for sound, took the purchase money as the price of a sound horse, and tries to keep it because he cheated on Sunday, or warranted the horse sound on Sunday, both of which he might do under the statute of 1821 and not be accountable therefor. The plaintiff tendered a return of the horse, which was refused. The tender operated to rescind the contract. It restored the parties to the same condition they were in before the sale, and the purchase money became the plaintiff's. The defendant cannot resist its return because of the old Sunday law. The same result would have followed had the plaintiff sued upon the contract for a breach of warranty. The defendant could not then have de-

fended until he had returned the consideration that he had received for making the warranty. Such return would have precluded a recovery, for the damages might have been more than the price paid, had not the contract been void; for the plaintiff would have been entitled to the benefit of his bargain,—that is, the horse, if sound, might have been worth more than the purchase price above what he was worth in the condition sold, unsound. A return of the horse, followed by a suit for the price paid, amounts to substantially the same thing as a suit for breach of the warranty. In either case the statute of 1880 bars the defense of Sunday contract until the price paid shall have been returned. *Wentworth v. Woodside*, 79 Me. 156, 8 Atl. 763; *Berry v. Clary*, 77 Me. 482, 1 Atl. 360; *Bank v. Kingsley*, supra.

In the second case at bar, the plaintiff procured another to hire for her, on Sunday, a horse and carriage for driving. The carriage let was unsafe, whereby the plaintiff was injured. She sues for damages received from the defective carriage while driving on Sunday. The act of 1821, as before seen, would bar recovery (*Wheelden v. Lyford*, 84 Me. 114, 24 Atl. 793); but the legislature enacted in Acts 1895, c. 129, that the act of 1821 (Rev. St. c. 124, § 20) shall not bar "any action for a tort or injury suffered on Sunday." The plaintiff's injury was suffered on Sunday by defendants' tort; that is, their negligence in letting an unsafe carriage. It matters not whether the plaintiff's action be assumpsit for breach of an implied warranty to furnish a suitable carriage, or case for negligence in not so doing. In either case, the action would be for an "injury suffered" on Sunday, and this the act of 1895 expressly excepts from the operation of the statute of 1821.

Exceptions sustained. Both actions to stand for trial.

DUNLOP v. MERCER.

In re DUNLOP.

(Circuit Court of Appeals, Eighth Circuit, 1907. 156 Fed. 545, 86 C. C. A. 435.)

Appeal from the District Court of the United States for the District of Minnesota.

Petition to Revise Proceedings of the District Court in a Bankruptcy Matter.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILLIPS, District Judge.

SANBORN, Circuit Judge.⁷ Two corporations of Arizona, which had been doing business in Minnesota, were adjudged bankrupts in the United States District Court in that state. The trustee of one of them, of the Waterbury-Zimmer Implement Company, filed a petition in the court below in the matter of the bankruptcy of the other, the

⁷ Part of the opinion is omitted.

Western Implement Company, for an order that certain vehicles, machinery, and other merchandise, which were in the possession of the Western Company when it was adjudged a bankrupt and thence came to the possession of the trustees of its estate, be delivered to the trustee of the property of the Zimmer Company, because, as he alleged, this property had been sold and delivered by the Zimmer Company to the Western Company under an agreement, dated February 5, 1906, to the effect that the title and ownership thereof should remain in the vendor until the goods were paid for in cash, and no payment on account of them had been made. The trustees of the Western Company defended on the grounds that the contract was not made until September 8, 1906, after most of the property had been delivered; that it was made with the intent to defraud the creditors of the Western Company; that it was withheld from record with like intent; that the Zimmer Company was not qualified to do business in Minnesota until June 30, 1906, after the larger part of the property had been delivered; and that the contract on its face evidenced an absolute sale of the property to the Western Company. Evidence was introduced, and the court overruled all the defenses except the last, but sustained that, and denied the prayer of the petition. This ruling was assigned as error, and the case is presented by petition to revise and by appeal. As it involves the consideration of the evidence of the relation of the parties and of their acts in making and performing the contract, it will be considered on the appeal, and the petition to revise is dismissed. * * *

But counsel argue with great ability and admirable ingenuity that the contract of conditional sale was violative of the qualifying statute, that it was consequently void, and therefore that the title and ownership of the property vested in the Western Company. But the premises of this syllogism fail to support its conclusion. If the contract was void because the corporation was not authorized to do business in Minnesota under its statutes, it was void in every part—in the agreement to sell, in the condition of the sale, and in the agreement to buy. An agreement of absolute sale would have been equally void. The contract was that the title and ownership of this property, which was in the vendor, should pass to the Western Company on condition that it paid its notes and accounts, and not otherwise, and that the Western Company would pay them. The latter company defaulted, and, if the agreement was valid, the ownership and title remained in the vendor. If the agreement was void, then there was no contract that the Western Company should pay the agreed price for the goods, or that the Zimmer Company would sell them, or that the ownership or the title to them should ever pass to the Western Company, either with or without condition, and they remained in the vendor. If the fact that the corporation could not lawfully make any contract whatever in Minnesota concerning these goods made its conditional sale of them upon which the minds of the parties met void, it could not have had the ef-

fect to create a contract of absolute sale to which neither party agreed, and which would have been equally void. What the appellees really ask here is that because, as they contend, the agreement of conditional sale was illegal and void, this court of equity shall make for the parties a new agreement of absolute sale to which neither of them agreed, and which would have been equally void, and that it proceed to enforce this new agreement, so that the creditors of the vendee, may appropriate to themselves property of the value of about \$12,000 which belongs in equity to the creditors of the vendor. This petition does not appeal with compelling force to the conscience of a chancellor, and it must be denied. The title and ownership of the property in controversy remained in the Zimmer Company, and they never passed to the Western Company, or to its trustees, whether the effect of the statutes of Minnesota relative to the authority of a foreign corporation to do business in that state rendered the contract of sale void or left it valid.

Moreover, if the sale had been an absolute one, and if it had been void, the trustee of the Zimmer Company might still have recovered this property. In *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, the Central Company had made a lease which was beyond its powers, in restraint of trade, against public policy, illegal, and void. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55. It had made this lease in the year 1870, and had thereby stripped itself of all its property, and the lessee, which had been in possession of this property and of its proceeds under this void contract for more than 10 years, refused to perform its part of the agreement, or to deliver back or to account for the property, it had received. The Supreme Court held the contract illegal and void, but compelled the lessee to pay back to the lessor \$17,000 in cash and the value of the cars and other property which it had received from the lessor under the void agreement, and which amounted in all to \$727,846.50 and interest. That court said: "The courts, while refusing to maintain any action upon the unlawful contract, have always tried to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it." *Central Transp. Co. v. Car Co.*, 139 U. S. 60, 11 Sup. Ct. 488, 35 L. Ed. 55; *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 150, 18 Sup. Ct. 808, 43 L. Ed. 108.

If, as counsel for the appellees claim, the contract evidenced an absolute sale, and it is void, no payment has ever been made for the property under consideration which the vendee and the trustees of its estate obtained under this agreement. No legal obstacle is perceived, in the light of the decision in *Pullman's Palace Car Company's Case*, to requiring them to restore it to the trustee of the vendor for the

benefit of its creditors to whom it in equity belongs, and no court which strives to do justice and succeeds would fail to do so. There would be in such a case an implied and an enforceable contract by the vendee to return the property, or its value, which it had secured without consideration under the void contract. *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473; *In re Hovey's Estate*, 193 Pa. 385, 48 Atl. 311, 315.

But was the contract void? Its only infirmity was that the Zimmer Company failed to comply with the regulations of the statute of Minnesota which conditioned its authority to make the contract, regulations with which it had ample power to comply, and that the statute imposed a penalty of \$1,000 and a disqualification to maintain suits in the courts of that state for a failure to comply with those regulations. The making and performance of the agreement were not morally wrong. In the absence of the statute there was no more evil in the doing of business by a foreign corporation in the state of Minnesota without a principal place of business, an appointed agent to accept service, and the payment of a license tax, than there was in so doing with them. The business which this corporation transacted was not, like the sale of liquor, a peril to the welfare of the citizens of the state and subject to regulation by its police power. It was the sale of machinery. It was a transaction of commerce, which was a benefit to the state and to its people. There was no moral turpitude and no peril to the citizens in the making or the performance of this contract. Still, it was undoubtedly violative of the statute and illegal.

Counsel invoke the general rules that an illegal contract, a contract in violation of the law of a state, is void and unenforceable in any court sitting in the state, and that the federal courts follow the construction of the Constitution and statutes of a state given by its highest judicial tribunal in cases which involve no question of general jurisprudence, of commercial law, or of right under the Constitution and laws of the United States, and they cite *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, in which the Supreme Court held that the contract of an unqualified foreign corporation for the sale of an engine and machinery in Colorado was not void because in making that sale the corporation was not doing business within the state of Colorado and because the business which it transacted was interstate commerce; *Miller v. Anmon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, in which a contract for the sale of liquor in Chicago without a license was held void, with the prefacing statement that its sale was a peril to the welfare of the community and its regulation within the police power of the state; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 613, 23 Sup. Ct. 206, 47 L. Ed. 328, in which a contract of an unqualified corporation to superintend the construction of and to operate a glue factory in the state of Wisconsin was held void under the statute of that state, which expressly declared,

and which the Supreme Court of that state had held, made such a contract "wholly void" on behalf of the foreign corporation, but valid and enforceable against it in favor of the other party to the agreement (*Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904); *Chattanooga N. B. & L. Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, in which a note and mortgage taken by an unqualified corporation in Alabama were held void because the Supreme Court of the state had held like contracts void under a statute of that state; *Trust Company v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, which has been reviewed *supra*; and *Kibbe v. Stevenson Iron Min. Co.*, 136 Fed. 147, 69 C. C. A. 145, and other cases which do not relate to this specific question. Many other cases, however, which treat of this subject, have been carefully read and considered, and they are cited, and some of them are reviewed, in *Butler Bros. Shoe Co. v. U. S. Rubber Company*, 156 Fed. 1, 84 C. C. A. 167, which was considered and decided with this case, and to which reference is made for citations.

The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power. *Fritts v. Palmer*, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188; *Logan County Bank v. Townsend*, 139 U. S. 67, 76, 11 Sup. Ct. 496, 35 L. Ed. 107; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 896, 897, 58 C. C. A. 79, 82, 83; *Sioux City, etc., Co. v. Trust Co.*, 82 Fed. 124, 134, 27 C. C. A. 73, 83; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 426, 48 C. C. A. 482, 487; *Speer v. Board of County Com'rs*, 88 Fed. 749, 758, 32 C. C. A. 101, 110; *National Bank of Xenia v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648; *O'Hare v. Bank*, 77 Pa. 96; *Pangborn v. Westlake*, 36 Iowa, 546; *Chattanooga R. & C. Co. v. Evans*, 14 C. C. A. 116, 121, 122, 66 Fed. 809, 815. * * *

The contract in suit was innocent in itself, yet illegal because it was violative of the statute; but it was not void, and the trustee of the vendor was the owner of the property in controversy under it. The order of the court below, which denied his petition for a return of the property or its proceeds, must be reversed, and the case must be remanded to the court below, with instructions to take further proceedings not inconsistent with the views expressed in this opinion. It is so ordered.

CONDITIONS AND WARRANTIES

I. In General¹

POPE v. ALLIS.

(Supreme Court of United States, 1885. 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393.)

Edward P. Allis, the defendant in error, was the plaintiff in the circuit court. He brought his suit to recover from the defendants Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of \$17,840, the price of 500 tons of pig-iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality which the defendants had agreed to furnish. The plaintiff also demanded \$1,750 freight on the iron, which he alleged he had paid. The facts appearing upon the record were as follows:

The plaintiff carried on the business of an iron-founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the city of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff 500 tons of No. 1 extra American and 300 tons No. 1 extra Glengarnock (Scotch) pig-iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants in New York. By a subsequent correspondence between the plaintiff and the defendants it fairly appeared that the latter agreed to ship the iron for the plaintiff at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which, in behalf of the plaintiff, agreed to pay for the iron on receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15th. Before its arrival at Milwaukee the plaintiff had not only paid for the iron, but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee the plaintiff examined the 500 tons American iron, to which solely the controversy in this case referred, and refused to accept it, on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 70-72.

The defenses relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was No. 1 extra American iron, and was of the kind and quality required by the contract; and (2) that the title having passed to the plaintiff when the iron was shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that if the plaintiff was entitled to recover at all, his recovery should be for \$22,315.40. The defendants pleaded a counter-claim for \$5,311, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for \$16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brings that judgment under review.

WOODS, J.² * * * 4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty. It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from

² Part of the opinion is omitted.

that for which he contracted. *Chanter v. Hopkins*, 4 Mees. & W. 404; *Barr v. Gibson*, 3 Mees. & W. 390; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Okell v. Smith*, 1 Stark, N. P. 107; notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. (7th Amer. Ed.) 37; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Manuf'g Co.*, 38 Wis. 346. See, also, *Nichol v. Godts*, 10 Exch. 191. So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. See, also, *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372. And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them; or, if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Ala. 679.

The authorities cited sustain this proposition: that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the circuit court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of *Thornton v. Wynn*, 12 Wheat. 184, 6 L. Ed. 595, and *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first, there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the de-

fendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion. Judgment affirmed.

PLANO MFG. CO v. ELLIS.

(Supreme Court of Michigan, 1888. 68 Mich. 101, 35 N. W. 841.)

This is an action of assumpsit, commenced in the recorder's court of the city of Niles, Michigan, by summons issued September 26, 1885. Plaintiff declared, orally, on the common counts, in assumpsit, and filed this bill of particulars: "Plaintiff's declaration: Common counts in assumpsit for the price and value of one Plano Manufacturing Co. binder, sold and delivered to the defendant by the plaintiff for the sum of \$120." Defendant pleaded the general issue, with notice. The recorder rendered judgment for the defendant, and plaintiff appealed to the circuit court, Berrien county, where judgment was rendered for plaintiff. Defendant appealed.

CHAMPLIN, J. On the eighth day of July, 1885, the plaintiff, through its agents Harder & Haynes, entered into an agreement with defendant in writing, as follows:

"Niles, Michigan, July 8, 1885.

"We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same.

Harder & Haynes.

"Peter Ellis."

Plaintiff, by its agents, delivered a Plano binder at defendant's farm, and set it up, and put it in operation. Defendant used it in cutting about 95 acres of grain, and claims that it did not do good work, and did not give to him satisfaction; and, on July 27, 1885, he served written notice on Harder & Haynes, as follows:

"Niles, Mich., July 27, 1885.

"Messrs. Harder & Haynes—Gentlemen: The sample Plano binder, that you let me have on trial, does not do good work, and does not give satisfaction. I am not satisfied with it. It is at my place, where you left it, subject to your order; you can come and take it. I am willing to pay for the use of the same, and hereby offer so to do.

"Yours, etc.,

Peter Ellis."

On the trial, testimony was offered to show how the machine worked. The defendant's counsel objected to its introduction, as being immaterial. The circuit judge overruled the objection, and admitted the testimony, saying: "My opinion of the construction of this contract is this: that it is to be a satisfactory machine, not to him, but such

as people knowing the quality of machines would be satisfied with; it is to do satisfactory work."

Under this ruling a large amount of testimony was received as to the working of the machine while in defendant's possession, and the circuit judge, construing the instrument, in his charge to the jury, instructed them as follows: "As I said in the outset, this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to intelligent, reasonable men using machinery." And again: "The question for you to determine is, was this machine capable, with proper management, of doing as good work as those that are called good, first-class machines, working through the country, under the same circumstances, and in the same kind of grain? Was it a good machine, and did it do good work, under proper management, and proper conditions; did it do that kind of work so it should have been satisfactory to a man of intelligence in relation to this kind of machines; did it do that? That is the question."

We are of opinion that the circuit court erred in the construction which he placed upon the contract. A cardinal axiom, in the construction of written contracts, is that all the parts must be examined, and effect given to every word and phrase, if practicable. *Vary v. Shea*, 36 Mich. 388; *Norris v. Showerman*, Walk. Ch. 206; *Id.*, 2 Doug. 16; *Paddock v. Pardee*, 1 Mich. 421; *Howell v. Richards*, 11 East, 643. The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. If the language employed is not free from doubt or uncertainty, resort may be had to the condition of the respective parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected with it, and everything except the contemporaneous and previous declarations of the parties, for the purpose of enabling the court to ascertain the intention of the parties. *Mills v. Spencer*, 3 Mich. 127, 136. Applying the above principles of construction to the writing introduced as the basis of plaintiff's claim, it is clear that the binder was not only to do good work, but it was to give satisfaction to defendant. Unless he was satisfied with the machine, although it did good work, he was not bound to purchase. The construction placed on the instrument by the circuit judge completely nullify the words "and give satisfaction." He construed them as synonymous with, to do satisfactory work, such as people knowing the quality of machines would be satisfied with; or, to use his own language, "this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to reasonable men using machinery."

This, certainly, is not the usual signification of the word, and there is nothing in the context, or in the subject-matter, which indicates that the word was used in any other than its ordinary meaning. The vendor had already agreed that the binder should "do good work," and if

the learned judge had defined that phrase in the same way he did the word "satisfaction," it would have been applicable and proper. No one can read this writing, and give to the words their ordinary meaning, without understanding that something more was required than that the binder should do good work before defendant was obliged to keep and pay for the machine. He was not obliged to do so unless, also, it gave satisfaction to him. We may not take judicial notice of the fact, but we may well suppose that there is a choice between machines for reaping and binding that do good work. It may be that a machine which will do good, satisfactory work in reaping and binding, may, at the same time, have more side-draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require greater care and skill in operating it. All these things may not be impossible, or even improbable. How, then, can it be said that, although it does good work, nevertheless it may not give satisfaction? Or why should it be said, when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine? There is another clause in the contract which has a bearing upon the question. It is stipulated that if the machine does not do good work, and give satisfaction, the said Ellis is to pay for the use of the same. It cannot be contended, with reason, that Ellis agreed to pay for the use of a machine that did not do good work. This clause implies that it may do good work, and yet not give satisfaction so that he will be willing to keep and pay for it. He agreed that, if it did not do good work, and give satisfaction, he would pay for the use of the binder. He was entitled, under the agreement, to give the machine a thorough, practical trial; and then, if he was not satisfied with it, he was to pay for the use of it. This provision entitles the writing to a liberal construction in his favor. It shows that he had an option to accept or reject the binder, according as it gave him satisfaction or not.

A proper construction of the contract clearly brings it within the first class of such contracts referred to in *Machine Co. v. Smith*, 50 Mich. 565-569, 15 N. W. 906, 45 Am. Rep. 57, and is governed by the decision in that case. The judgment must be reversed and a new trial granted.

II. Warranties ³

J. I. CASE PLOW WORKS v. NILES & SCOTT CO.

(Supreme Court of Wisconsin, 1895. 90 Wis. 590, 63 N. W. 1013.)

Action by the J. I. Case Plow Works against the Niles & Scott Company, for breach of warranty. There was a judgment for plaintiff, from which both parties separately appeal.

The plaintiff brought action against the defendant company, engaged in the manufacture of wheels for agricultural implements, to recover damages sustained by reason of the breach of warranty of 11,000 such wheels, ordered and purchased of the defendant under a written contract dated August 16, 1888, which, it appears, was a written order given by the plaintiff to the defendant, and accepted by the latter, in writing, as follows:

"You may enter our order for our season's wants on the following styles of wheels, and at the prices and terms named:

32-in. walking cultivator wheel, 1¼ rim, half oval, 8 steel spokes or 10 iron spokes, ¾.....	\$ 60 each
32-in. walking cultivator wheel, 1¼ rim, half oval, 8 steel or 10 iron spokes, ¾.....	59 each
32-in. sulky wheel, 2¼ rim, half oval, 14 steel spokes, ¾.....	1 00 each
24-in. wheel, 2 in. double channel rim, 8 steel spokes, ¾.....	70 each
* * * * *	

"You to guaranty the wheels against breakage in shipping, and against defects in material and workmanship. * * *"

It was alleged in the plaintiff's complaint that the defendant, at the time of entering into the contract, well understood and knew that the plaintiff desired said wheels to attach to the farm machinery manufactured by it, such as cultivators, etc., and that the defendant guarantied the wheels as above stated, and that said wheels should be proper and suitable for the purposes for which the plaintiff desired them; that the plaintiff ordered and received of the defendant, under the contract, wheels to the number of 11,000, and paid it therefor \$7,331.12; that at the time of the sale such wheels were defective in material, construction, and workmanship, and were totally unfit for the uses and purposes for which the plaintiff purchased them, to its damage of \$7,331.12; that the plaintiff, at great expense, and relying on said guaranty, placed large numbers of such wheels upon plows, cultivators, etc., and placed the same on the market, and, when tested, said wheels were found worthless, and a large number of such plows, cultivators, etc., were returned by the various purchasers of the same, and the plaintiff was put to \$5,000 expenses in the

³ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 73-75.

premises, and by reason of such defective wheels it lost the sale of a large number of its machines and implements, and suffered injury to its business and reputation.

The defendant denied that it made any other or further warranties than those expressed in the contract, and it alleged that, prior to making the contract, samples of wheels were carefully examined and tested by the plaintiff, and that it had full knowledge of the principle of construction of said wheels, and of the material, workmanship, and quality thereof, and of all weakness, if any, and liability to breakage, except from defective material or workmanship, and made selection of the kind of wheels it desired, and of the materials thereof, and assumed the risk of failure or breakage, except from shipment, defective materials or workmanship.

PINNEY, J.⁴ The finding of the court proceeds, in part, upon the basis of an implied warranty that the wheels were suitable for the purpose for which the plaintiff desired them, namely, "for our season's wants," it being engaged in manufacturing plows, cultivators, etc., intending to attach them to such implements, with which it was supplying the trade, and in part on the basis of the written warranty "against defects in material and workmanship," the defendants having used common iron in the manufacture of the spokes, and that the wheels were defective in material, and were not fit and proper for the uses and purposes for which they were desired. The plaintiff's damages were assessed at the gross sum of \$4,655.54, but how much for defective materials, or how much upon the breach of the alleged implied warranty, it is impossible to say, nor does it appear upon what number of wheels the assessment was made; so that, in the view we have taken of the rights of the parties, judgment cannot be given on the finding, and a new trial becomes necessary.

1. The wheels were made specially for the plaintiff, and it specified the sizes, dimensions, and material, and had looked over and examined wheels of that kind manufactured by the defendant, which had been tested in the presence of the plaintiff's representatives, as to their quality and strength, before signing the contract. In the absence of any written or oral warranty, it seems to be quite well established that in such a case as the present no warranty of the suitability of the wheels for the purpose desired can be implied. The purchaser, in such case, takes the risk of the fitness of the wheels for their intended use; and although it was stated that they were required for a particular purpose, if the known, defined, and described kind of wheels was actually supplied, there was no implied warranty that they would answer the particular purpose intended by the purchaser, although intended and expected to do so. This is made clear in *Leake*, Cont. 404. The contract was not for the manufacture of wheels generally, to satisfy a required purpose, but for the manufacture and delivery of

⁴ The statement of facts is abridged and part of the opinion is omitted.

a specific kind or plan of wheels, of specified dimensions and sizes. This was the essential matter of the contract. *Boiler Co. v. Duncan*, 87 Wis. 120, 124, 58 N. W. 232, 41 Am. St. Rep. 33; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Jones v. Just*, L. R. 3 Q. B. 197, 202; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Seitz v. Machine Co.*, 141 U. S. 518, 12 Sup. Ct. 46, 35 L. Ed. 837; *Deming v. Foster*, 42 N. H. 165. Where, however, a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose for which it is to be applied. *Benj. Sales* (4th Ed.) § 657; *Jones v. Just*, supra. The test in such cases is whether the purchaser trusts and relies upon the judgment of the manufacturer, and not upon his own. *Brown v. Edgington*, 2 Man. & G. 279; *McQuaid v. Ross*, 85 Wis. 494, 496, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864. This case, we think, falls within the rule first stated, and that there was no implied warranty of suitableness of the particular kinds of wheels, with specified sizes and dimensions, required by the plaintiff.

2. It is insisted, however, that the plaintiff relied upon the representations made by the defendant's agent as to the plan or method of construction, and, in particular, the manner of securing the spokes in the hubs of the wheels; but these representations preceded the execution of the written contract, and the plaintiff took a limited warranty, incorporated in the written contract, in respect to material and workmanship, going to and covering in part the suitableness of the wheels for the purpose for which the plaintiff desired them. Where an article is sold by a formal written contract, which is silent on the subject of warranty, no express or oral warranty made at the same time or previously can be shown, nor can any additional oral warranty be ingrafted upon or added to one that is written, as the written instrument is conclusively presumed to embody the entire contract. *Merriam v. Field*, 24 Wis. 640; *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892; *De Witt v. Berry*, 134 U. S. 312, 10 Sup. Ct. 536, 33 L. Ed. 896. The rule on this subject is too firmly settled to require discussion, or the citation of other authorities. Evidence to show an express oral warranty of the wheels, made previous to the written contract, was therefore clearly incompetent.

3. The contention of the plaintiff that it was not precluded by the warranties in the written contract from insisting upon an implied warranty that the wheels should be suitable for the purposes for which they were required, for reasons in addition to those already stated, cannot, we think, be sustained. The fact that the limited warranties going to the question of suitableness of the wheels were expressed in the contract, by the strongest implication, excludes and negatives the idea that it was intended that other or more comprehensive warranties

should exist, and repels any implication of law to that effect. The contract, as written, must be taken as the final and conclusive evidence of all that was intended or agreed upon. The familiar rule, "*Expressio unius est exclusio alterius*," clearly applies. The demand of the purchaser for certain specified warranties indicates that no others were intended or expected. Had the parties intended that there should be an implied warranty, there was no occasion to make any stipulation on the subject. The one introduced must be taken as covering the entire subject; otherwise it would be idle and unmeaning. Adjudicated cases on this point are numerous and conclusive.

We have not been referred to any decision expressly on the point to the contrary. *Dickson v. Zizinia*, 10 C. B. 602; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Baldwin v. Van Deusen*, 37 N. Y. 487; *De Witt v. Berry*, 134 U. S. 313, 10 Sup. Ct. 536, 33 L. Ed. 896; *Carleton v. Lombard, Ayres & Co.*, 72 Hun, 254, 25 N. Y. Supp. 570, 575; *Whitmore v. Iron Co.*, 2 Allen (Mass.) 58; *Deming v. Foster*, 42 N. H. 165; *Budd v. Fairman*, 8 Bing. 52; *Shepherd v. Gilroy*, 46 Iowa, 193. The case of *Merriam v. Field*, 24 Wis. 640, was relied on as establishing a contrary view. In that case there was an express warranty of title in the bill of sale, but it was held that facts might be shown from which an implied warranty of quality would arise. Between these two subjects there was no dependent connection, but each stood by itself. There was not, as in this case, any qualified or restricted warranty upon the question of quality or suitability, and the case was ruled on the authority of *Bigge v. Parkinson*, 7 Hurl. & N. 955, where the warranty, as in *Merriam v. Field*, was on a separate and independent subject, namely, that the goods would pass inspection, and it was held that an express written warranty on that subject would not preclude an implied one that the goods were in fact fit for the purpose intended. The case of *Boothby v. Scales*, 27 Wis. 626, was also referred to, but in this case there was no express warranty by written contract, and it was held that an implied warranty of suitability might exist, although a handbill had been delivered at the time of the sale, and the agent of the vendor affirmed of the fanning mill that it possessed the capacities therein set forth. There was no written warranty on any subject, and the particular point litigated was that the agent making the oral affirmation had no authority to warrant the mill. The case, therefore, is no authority upon the point under consideration.

As already stated, the plaintiff having specified the sizes and dimensions and materials of the particular plan or kind of wheel it desired, and its agents having looked over and examined wheels of that kind, manufactured by the vendor, which had been tested in their presence as to their quality and strength, the conclusion seems irresistible that, subject to defects in material and workmanship, the case falls within that of *Boiler Co. v. Duncan*, 87 Wis. 122, 58 N. W. 232, 41 Am. St. Rep. 33, and the plaintiff must be held to have obtained that for which

it contracted, subject to such remedy as it may be entitled to on the warranties against defective material and workmanship; and, in this connection, it is proper to observe that a defect in the plan of the wheels is not a defect of workmanship, for workmanship has only to do with the execution of the plan, and it follows that the objection much relied on, that the plan for the wheels was defective and impracticable, is not covered by the written warranties. The plan relates to the question of suitability of the wheels for the purpose for which they were purchased, in relation to which, for reasons already stated, we hold that there was no implied warranty. * * * Reversed on each appeal.

CARLETON v. LOMBARD, AYRES & CO.

(Court of Appeals of New York, 1896. 149 N. Y. 137, 43 N. E. 422.)

Action by T. Osgood Carleton and another against Lombard, Ayers & Co., a corporation, for alleged breach of contract to deliver plaintiffs a specified quality and quantity of petroleum. From a judgment of the general term, first department (28 N. Y. Supp. 1107) affirming a judgment for defendant, plaintiffs appeal.

O'BRIEN, J.⁵ The plaintiffs sought to recover damages in this action for the breach of an executory contract for the sale of goods. The defendant is a domestic corporation engaged in refining crude petroleum for sale and export, and both parties to the action were members of the New York Produce Exchange. On the 10th of January, 1887, the parties entered into a contract in writing, which, by its terms, was made subject to the rules of the exchange, whereby the defendant agreed to sell and deliver to the plaintiffs a large quantity of refined petroleum. The following is the material part of the contract, in which the kind, quantity, and price of the goods are specified, as also the time and place of delivery, in these words: "Fifty-five thousand cases, ten per cent., more or less, each case packed with two of their patent cans, with low screw tops or nozzles and brass labels, containing five gallons each of refined petroleum of their Stella brand, color standard white or better, fire test 76 degrees Abel or upwards, at eight and one-half cents per gallon, cash on delivery. To be delivered in yard, free of expense to vessel; to be ready not earlier than the twenty-fifth January, 1887, not later than the tenth of February, 1887, with twenty-five days to load. Brass labels one-half of one cent each."

It appears that before closing this contract the plaintiffs had received from the firm of Graham & Co., merchants at Calcutta, British India, an offer to purchase a like amount of refined petroleum of the same brand, color, test, and packing, to be shipped at the port of New

⁵ Part of the opinion is omitted.

York, not later than March 15, 1887, for their account and risk, on board the British ship *Corby*, bound for Calcutta. This offer the plaintiffs accepted on the same day that they entered into the contract with the defendant, and immediately after closing it. On or before March 1, 1887, the defendant delivered the oil, packed in the manner specified in the contract, to the plaintiffs, alongside the *Corby*, at its factory at Bayonne. The delivery by the defendant to the plaintiffs, and by the plaintiffs to their vendees in Calcutta, was thus accomplished by substantially the same act. The rules of the Produce Exchange, which were made part of the contract between the plaintiffs and the defendant, so far as material to the questions involved, were these: (1) The committee on petroleum were authorized and required to license duly qualified inspectors, members of the exchange, for the various branches of that business. (2) Buyers should have the right of naming the inspector, but must do so at least five days before the maturity of the contract. Failing in this, the seller might employ any regular inspector at the buyer's expense, and his certificate that the oil is in conformity with the contract shall be accepted. (3) When goods are delivered to vessel by buyer's orders, the acceptance of them by buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract.

The plaintiffs, under the rule, named the inspector, who on March 1, 1887, after the cargo was loaded on board the *Corby*, made and delivered to them a certificate in writing which certified that he had inspected the oil shipped on board the *Corby*, and stated therein the brand, color, test, and gravity of the same, which corresponded with the contract. The vessel started upon her voyage. The plaintiffs paid the defendant the purchase price of the oil, and then drew upon the parties in Calcutta to whom they had sold, for the price as between them, and their draft was paid. The vessel did not arrive at Calcutta till some time in June, and, when she began to discharge the cargo, it was found that the cans had become corroded from the inside by some foreign substance in the oil, and so perforated that they did not retain their contents. A large part of the oil was lost by leakage, and the whole cargo was pronounced unmerchantable, and finally sold at Calcutta for a small sum, for account of whom it might concern. When the condition of the goods was discovered by the consignees, during the discharge of the cargo from the ship, the plaintiffs were notified by cable of the situation and the condition of the oil. They laid these dispatches before the defendant, and a long correspondence by cable followed, in which the defendant participated, and of all of which it had knowledge. The purpose of it was to ascertain the defect, if any, in the oil, and to reach some amicable arrangement. In the end all parties seem to have become satisfied that a large loss had been sustained, and the parties in Calcutta, who had paid the plaintiffs for the property, called upon them to make good their contract. The plain-

tiffs in turn called upon the defendant to indemnify them from loss, and it then took the ground that it had, in all respects, performed its contract, and was not liable for the result. * * *

The property which was the subject-matter of the contract between the parties was not in existence at the time it was made, but was thereafter to be produced by refinement of the crude material through a manufacturing process by the defendant. It was therefore a contract by a dealer with a manufacturer, and is subject to the rules and principles that apply to executory contracts for the sale and delivery of goods when the parties occupy these relations to each other. It is a conceded fact in the case that the oil delivered by the defendant to the plaintiffs alongside the Corby was of the kind and quality described in the written contract. In quantity, brand, color, and fire test, it corresponded with the terms of the contract. But it is claimed that, while all this is true, yet there was a latent or hidden defect in the article so delivered, the result of improper refinement or manufacture, not discernible upon inspection, which rendered the oil unmerchantable, and unfit for transportation by sea in a sailing vessel, and that this defect was the cause of the loss which the plaintiffs have sustained.

The most important question in the case is whether the defendant, notwithstanding its written contract, is bound to make good the loss, assuming that it was caused by such defect in the goods. The general rule of the common law, expressed by the maxim *caveat emptor*, is not of universal application, though the exceptions are quite limited; and one of them is the case of a manufacturer who sells goods of his own manufacture, who, it is said, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. The seller in such a case is liable for any latent defect arising from the manner in which the article is manufactured, or from the use of defective materials, the character of which he is shown or is presumed to have knowledge of. This rule, and the reasons upon which it rests, or its qualifications and limitations, have seldom been stated in the same form by courts and writers upon the subject; but that it exists, as a principle in the law of contracts, cannot be doubted. The leading case in this state is *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163. The learned judge who framed the opinion in that case, after stating the rule, proceeds to show the grounds upon which it rests. In his view, while this peculiar obligation is called a "warranty," for convenience, it does not rest upon any supposed intention of the parties or agreement, in fact, but is one which the law raises upon principles foreign to the contract, in the interest of commercial honesty and fair dealing, and analogous to those upon which vendors are held liable for fraud.

It is quite difficult to reconcile the authorities upon the question, but it may be observed that they recognize the principle that in such cases the seller and buyer do not deal with each other quite at arm's length;

that the seller possesses superior knowledge on the subject, upon which the buyer is presumed to repose some degree of confidence; and that commercial honesty and fair dealing require that in such cases the seller be held bound to deliver the article free from secret or latent defects which are actually or presumptively within his knowledge. The principle was applied, in a later case in this court, to a contract for the sale of seeds of a particular description by the grower. It was there said that, as the grower of seeds must be presumed to be cognizant of any omission or negligence in cultivation whereby they were rendered unfit for use, there was the same reason for implying a warranty that they were not defective from improper cultivation, as, in the case of a sale of an article by a manufacturer, that it is free from latent defects. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

The latest case that I have been able to find upon the question is *Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86. The leading cases bearing upon the point, both in this country and England, are there reviewed, and the court stated the principle in these words: "When the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purpose for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects, of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer and maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

The principle is distinctly admitted in the opinion of the learned court below, and I do not understand that it is denied by the learned counsel for the defendant. It is strenuously urged, however, that it can have no application to a case like this, where the contract is in writing, with such ample description of the goods sold. But the obligation attached to an executory contract for the sale of goods by the manufacturer or maker cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it is true, is deemed to express the whole agreement of the parties, but since this peculiar liability arises from the nature of the transaction and the relations of the parties, without express words or even actual intention, it will

remain as part of the seller's obligation, unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale. The parties may, of course, so contract with each other as to eliminate this obligation from the transaction entirely. The seller may, by express and unequivocal words, exclude it, and, in like manner, the buyer may waive it. So, also, the parties may provide for a delivery or inspection of the article when made, which will operate to extinguish the liability upon acceptance. *McParlin v. Boynton*, 8 Hun, 449, and 71 N. Y. 604. In this case the parties did provide for an inspection of the oil. The scope and effect of that provision of the contract will be considered hereafter, but, aside from that, there was no language used indicating any intention on the part of the buyer to waive, or the seller to exclude, the liability of a manufacturer.

The proposition upon which the case turned in the court below, and upon which the judgment is defended here, was thus stated by the learned judge in the opinion at general term: "It is well settled that, when an article is sold under a contract which specifies the qualities which it shall possess,—no matter whether the language be a condition or a warranty,—the law will not, except in special cases, imply a warranty or condition that the article has other qualities. A warranty or condition, in a contract of sale, that the article sold has certain qualities, excludes the implication of a warranty or condition that it possesses other qualities." From the operation of this general proposition, it will be seen that the learned judge excepts special cases, which, however, are not designated. In its application to this case the rule thus stated must mean that since the parties have, in their contract, specified the particular brand, color, and fire test of the refined petroleum which was the subject of the sale, the manufacturer's obligation to deliver an article free from latent defects, arising from the process of manufacture, which would render it unmerchantable, has been excluded by implication. This is not, we think, the meaning of the rule to which the learned judge referred in the language quoted. The rule means that, where parties to a contract of sale have expressed in words the warranty by which they intend to be bound, no further warranty will be implied by law, but that expressed will include the whole obligation of the seller. *Benj. Sales*, § 666; *Deming v. Foster*, 42 N. H. 165.

Moreover, this principle applies to sales of specific, existing chattels, and not ordinarily to sales of goods to be made or supplied upon the order of the buyer. There is much confusion in the cases on this subject, arising, doubtless, from an inaccurate use of the term "warranty." When an article is sold by the owner or maker by the particular description by which it is known in the trade, it is a condition precedent to his right of action that the thing which he has delivered, or offers to deliver, should answer this description. But in many cases in modern times the sale of a particular thing by terms of

description has been treated as a warranty, and the breach of such a contract a breach of warranty, whereas it would be more correct to say that it was a failure to comply with the contract of sale which the party had engaged to perform. *Chanter v. Hopkins*, 4 Mees. & W. 404; *Benj. Sales*, § 600. There are many cases in which such words of description are not considered as warranties at all, but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. 2 *Smith*, Lead. Cas. (6th Eng. Ed.) 27; 2 *Schouler*, Pers. Prop. pp. 352, 353. The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale, and known as a "warranty." *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 335.

It is not now important to inquire how far, or under what circumstances, the principle stated by the learned judge applies to contracts of sale of goods in esse between dealers, in which there is an express warranty. It is not, we think, applicable to the obligation of a manufacturer who contracts, as in this case, for a sale of his own product, the condition of which he is presumed to know. It is plain that in the case at bar the plaintiffs intended to buy, and the defendant to sell, an article of refined petroleum, which should not only correspond to the description in the contract, but should be free from latent defects arising from the process of manufacture, so as to constitute a thing which, in the commercial sense, would be of some use or value. It is quite conceivable that the oil might correspond with all the descriptions of the contract, and yet be a useless and unmerchantable thing, in consequence of defects arising from the process of manufacture, in which case the buyer would have the shadow of the thing bought, without the substance. The defendant's obligation rests, not only upon the terms of the contract, but upon its superior knowledge and the confidence which the buyer placed in its ability to produce a proper article; and hence the relations of the parties are quite different from that of dealers in the article in the market, each possessing equal means of information and opportunity for the detection of latent defects. A strict adherence to the bare descriptive words of the contract would not express the full obligation of the defendant. That the commodity shall be so free from latent defects arising from the process of refining, and which could be guarded against by ordinary care, so as to render it merchantable, is a term to be implied in all such contracts. *Story*, Cont. (4th Ed.) §§ 836, 837; *Jones v. Just*, L. R. 3 Q. B. 197.

The plaintiffs were entitled to something more than the mere semblance or shadow of the thing designated in the contract. They were entitled to the thing itself, with all the essential qualities that rendered it valuable as an article of commerce, and free from such latent defects as would render it unmerchantable. *Mody v. Gregson*, L. R. 4 Exch. 49. If the goods in question were in fact unmerchantable, in consequence of latent defects arising from the process of manufacture, and which the defendant could have guarded against by the exercise of reasonable care, it would be quite unreasonable to hold that the defendant has, nevertheless, performed the contract, because it has delivered oil of the same brand, color, and test specified. It is quite clear that the words of the written contract do not exclude a liability on the part of the defendant for fraud in the performance, and it is difficult to see how it can affect an obligation of the seller, who is also a manufacturer, which is based upon his actual or presumed knowledge of latent defects in the oil, arising from the process of refinement.

In the construction of commercial contracts for the sale and delivery of goods, the courts are not always bound by the literal meaning of words descriptive of the article, contained in the contract. It frequently happens, in large transactions, that the article which is the subject of the contract is described by some vague, generic word, which, taken strictly and literally, may be satisfied by a worthless or defective article. In such cases the words may mean more than their bare definition or literal meaning would imply, and impose upon the seller an obligation to furnish, not only the thing mentioned in the contract, but a merchantable article of that name. *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526. If it be true that the defendant in this case delivered alongside the vessel an article which was unmerchantable and unfit for transportation, in consequence of hidden latent defects arising from the process of manufacture, and of which it had, or should have had, knowledge, in the exercise of reasonable care, it has not, in any just or substantial sense, performed its contract, although the article so delivered was of the brand, color, test, and specific gravity called for by the writing. The plaintiffs were not only entitled to the thing described, but to that thing in such condition, and so free from hidden defects, as to make it available to them as an article of commerce, and fit for transportation.

Whether this liability survived the delivery and inspection of the goods remains to be considered. When the rules of the exchange are read into the contract, it is provided that the acceptance of the petroleum by the buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract; and, as we have seen, the inspector so certified. The inspector was not the agent of either party, but an umpire selected to determine whether the article delivered alongside the Corby corresponded with the contract. The parties, in effect,

submitted a certain question to the decision of the inspector, and that was whether the oil corresponded, in brand, color, and fire test, with the contract. He was not authorized to determine whether there was or was not any hidden or latent defects in the article at the time and place of the delivery which would render it unmerchantable. That question was not within the fair scope or purpose of the inspection, and the certificate on this point does not conclude the parties. If, however, the defects which the plaintiffs now claim existed at the time of delivery, and which they claim to have produced the damages, were discernible upon the inspection contemplated by the contract, they were not hidden or latent defects, within the meaning of the rule, and in that case the certificate would conclude the parties. If, in executing the power to determine the brand, color, fire test, and gravity of the article delivered, any other defect which would render it unmerchantable would necessarily appear, the plaintiffs are concluded as to that defect by the certificate of the inspector. *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Pan Co. v. Remington*, 41 Hun, 218.

If I am right in these several propositions, it must follow that the plaintiffs were entitled to prove upon the trial, if they could, that the refined petroleum delivered by the defendant alongside the Corby, though corresponding with the description of the article in the contract, had in it some hidden or latent defect, not discernible by the inspection provided for, which then and there rendered it unmerchantable. * * * Reversed.

BLACKMORE v. FAIRBANKS, MORSE & CO.

(Supreme Court of Iowa, 1890. 79 Iowa, 282, 44 N. W. 548.)

Action to recover damages alleged to have been sustained by reason of breach of warranty in the sale of machinery. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

ROBINSON, J.^a The agreement under which the machinery in controversy was sold was in writing, and in the form of an order. The portions material to a determination of the questions raised on this appeal are as follows: "Messrs. Fairbanks, Morse & Co., Chicago: Please furnish me at once the following-named goods: * * * One 25 H. P. Standard Westinghouse engine; one 30 H. P. boiler, with fixtures complete, and machines as follows: One steam-pump, with sufficient capacity to supply boiler and heater with water taken from the well; * * * one Stillwell heater and connections complete. * * * This order is for the engine and boiler at Lester-ville, D. T., with fixtures complete, except inspirator and heater; the latter to be replaced with the Stillwell heater. Said outfit to be in

^a Part of the opinion is omitted.

good order, except from exposure to weather at Lesterville, which has not damaged the real merits of the machinery." The machinery specified in the agreement was delivered to plaintiff.

The petition alleges that the machinery was "warranted to be sufficient to furnish the motive power for the Aplington Grist & Flouring Mills, and be sound, and do good work, as specified in said warranty. * * * That on a specified test thereof, said engine, machinery, and appliances sold by defendant to plaintiff proved defective and insufficient, in this: that it throws crank case oil into the heater and boiler, so as to render it dangerous, insufficient, and entails great expense in its operation, and is insufficient to furnish the motive power for plaintiff's said mill." The answer denies the alleged warranty, denies the alleged defects in the machinery, and avers that the cause of the throwing of crank case oil into the heater and boiler was the use by plaintiff of an open heater, without an oil extractor. * * *

Appellant complains of the refusal of the court to give certain instructions asked by it, and of the giving of a portion of the charge on the same subject, which is as follows: "Under this contract, it was the duty of the defendant to furnish to the plaintiff an engine of the kind described, of twenty-five horse power, and all other machinery and appliances specified in the contract, in good condition, and fit for use, except as damaged by exposure to the weather at Lesterville, Dak.; and if the defendant failed and refused to furnish the plaintiff the said machinery in the condition specified, it would be liable to the plaintiff for damages in such sum as you may find from the evidence, and under the instructions, he has suffered." Appellant contends that its contract would have been fully complied with, had it delivered to plaintiff a Standard Westinghouse engine in the condition in which such engines are turned out at the factory, whereas the instruction given required defendant to deliver a Westinghouse engine in good condition, and fit for use, except as damaged by the weather; or, in other words, that the court construed the contract to include a warranty that the engine to be delivered, not only had not suffered injury, except by the weather, since it left the hands of the manufacturer, but also that it was so constructed as to be fit for use, and for the use plaintiff desired to make of it.

The rule in regard to an implied warranty of quality has been stated as follows: "So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule of caveat emptor admits of no exception by implied warranty of quality. But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given." 2 Benj. Sales, § 966. See, also, *King v. Gottschalk*, 21 Iowa, 513. In this case,

plaintiff had not inspected the property ordered, and had no opportunity to do so, when the order was given. On the other hand, defendant knew the use for which the property was intended. Therefore, unless excluded by the terms of the order, there was an implied warranty that the property was fit for the designed use, and that it was in merchantable condition.

Appellant contends that the order, in effect, contains an express warranty that the property shall be in good order; hence, that implied warranties must be excluded. It is true that, as a general rule, no warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound, (2 Benj. Sales, § 1002;) but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract. Thus, an express warranty of title does not exclude an implied warranty of quality. *Id.*, note 40, and cases therein cited; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 632; *Roe v. Bacheldor*, 41 Wis. 360; *Wilcox v. Owens*, 64 Ga. 601; 10 Amer. & Eng. Cyclop. Law, 109. A warranty will not be implied in conflict with the expressed terms of the agreement; but there is no conflict of that kind in this case. The implied warranty that the machinery is fit for the use for which it was purchased is in harmony with the provisions specifying the power of the engine and boiler, and that it should be in good order, except from exposure to the weather at Lesterville. We think the instruction in question was correct, and that those asked by defendant were properly refused. This conclusion is not in conflict with the cases relied upon by appellant, among which are *Warbasse v. Card*, 74 Iowa, 306, 37 N. W. 383; *Mast v. Pearce*, 58 Iowa, 579, 8 N. W. 632, and 12 N. W. 597, 43 Am. Rep. 125; and *Nichols v. Wyman*, 71 Iowa, 160, 32 N. W. 258. An examination of those cases will show that they decided, in effect, that the terms of an agreement in writing could not be varied or contradicted by evidence of a parol contemporaneous agreement.

No question in regard to warranties implied by law was involved. The judgment of the district court is affirmed.

III. Implied Warranty of Title ⁷

GOULD v. BOURGEOIS.

(Supreme Court of New Jersey, 1889. 51 N. J. Law, 361, 18 Atl. 64.)

DEPUE, J.⁸ This suit was upon a promissory note made by the defendant. The defense was the want or failure of consideration.

⁷ For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 76.

⁸ Part of the opinion is omitted.

The city council of Holly Beach City proposed to build a breakwater. The defendant was an applicant for a contract to do the work, and prepared and sent to the city council an agreement with the city to that effect. Members of the city council sent word to the defendant that the city had already entered into a contract for the building of the breakwater with Gould & Downs, that these parties could not fulfill their contract, and that, if the defendant would make a satisfactory arrangement with Gould & Downs, the city would give him the contract. The parties thereupon entered into negotiation, the conclusion of which was a contract in writing and under seal, whereby Gould & Downs, for the consideration of a note for \$375 and \$500 in city bonds, assigned to the defendant "all our right, title, and interest in a certain contract entered into by the authorities of Holly Beach City and ourselves to build a certain breakwater ordered built by a resolution passed April 14, 1887." Subsequently, the city council, having obtained the opinion of counsel that the city had no power to build the breakwater, refused to ratify the arrangement of the defendant with Gould & Downs, and abandoned the project of constructing the work. The note sued on was given in compliance with the terms of this assignment. There was no proof of an express warranty by Gould & Downs of the validity of their contract, nor any evidence from which fraud, either in representation or concealment on their part, could be inferred. The power of the city to make the contract was not mooted until after these parties had concluded their arrangement and the assignment had been made; and, if the contract was invalid, its invalidity arose from the city charter,—a public act equally within the knowledge of both parties.

The defendant's contention was that, inasmuch as there was a sale of the contract, a warranty that the contract was a valid contract was implied, and that, the contract being *ultra vires* on the part of the city, and void, the consideration entirely failed. If the proposition on which the defense was rested be sound in law, the defense was appropriate in this suit. The doctrine of implied warranty of title in the sale of goods applies as well to the sale of a chose in action, and extends not merely to the paper on which the chose in action is written, but embraces also the validity of the right purported to be transferred. *Wood v. Sheldon*, 42 N. J. Law, 421, 36 Am. Rep. 523. Nor is there anything in the nature of the alleged infirmity of the contract that would bar the defense. In the ordinary case of a suit on a breach of warranty of title the validity of the vendor's title against the adverse claimant is triable, if the purchaser has in fact lost title, although the transactions which determine the vendor's title are *res inter alios acta*. If the contract which was the subject-matter of the assignment was in fact *ultra vires*, a foundation was laid for this defense, the city having repudiated the contract in limine on that ground.

The validity of the defense offered and overruled depends upon the fundamental proposition whether, under the circumstances of this sale, a warranty of title is implied in law. The theory on which a warranty of title is implied upon the sale of personal property is that the act of selling is an affirmation of title. The earlier English cases, of which *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593, is a type, adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person; annexing a warranty of title to the former, and excluding it in the latter. In the celebrated case of *Pasley v. Freeman*, 3 Term R. 51, Buller, J., repudiated this distinction. Speaking of *Medina v. Stoughton*, this learned judge said that the distinction did not appear in the report of the case by Lord Raymond, and he adds: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." Nevertheless the English courts continued to recognize the distinction, with its incidents, as adopted in *Medina v. Stoughton*, to some extent, at least so far as to annex the incident of an implied warranty of title on a sale by a vendor in possession.

Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. Mr. Benjamin, in his *Treatise on Sales*, after a full examination and discussion of the late English cases, states the rule in force in England at this time in the following terms: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." 2 Benj. Sales, (Corbin's Ed.) §§ 945-961. In this country the distinction between sales where the vendor is in possession and where he is out of possession with respect to implied warranty of title, has been generally recognized; but the tendency of later decisions is against the recognition of such a distinction, and favorable to the modern English rule. *Id.* § 962, note 21; *Bid. War.* §§ 246, 247. The American editor of the ninth edition of *Smith's Leading Cases*, in the note to *Chandelor v. Lopus*, after citing the cases in this country which have held that the rule of *caveat emptor* applies to sales where the vendor is out of possession, remarks that in most of them what was said on that point was *obiter dicta*, and observes "that there seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it." 1 Smith, *Lead. Cas.* (Edson's Ed.) 344.

In *Wood v. Sheldon*, *supra*, Chief Justice Beasley, in delivering the opinion of the court, adopted, in terms, the rule stated by Mr. Benjamin; and made it the foundation of decision. The precise question now under discussion did not then arise. In *Eichholz v. Bannister*, 17 C. B. (N. S.) 708-721, Erle, C. J., said: "I consider it to be clear upon the ancient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract; and that if he is not the owner his contract is broken. * * * In almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale." In that case it was held that on the sale of goods in an open shop or warehouse, in the ordinary course of business, a warranty of title was implied; but there is a line of English cases holding that, where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied.

In this proposition the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction. Thus in *Morley v. Attenborough*, 3 Exch. 500, the holding was that on a sale by a pawnbroker at public auction of goods pledged to him in the way of business there was no implied warranty of absolute title, the undertaking of the vendor being only that the subject of the sale was a pledge, and irredeemable by the pledgor. In *Chapman v. Speller*, 14 Q. B. 621, the defendant bought goods at a sheriff's sale for £18. The plaintiff, who was present at the sheriff's sale, bought of the defendant his bargain for £23. The plaintiff was afterwards forced to give up the goods to the real owner. He then sued the defendant, alleging a warranty of title. The court held that there was no implied warranty of title nor failure of consideration; that the plaintiff paid the defendant, not for the goods, but for the right, title, and interest the latter had acquired by his purchase, and that this consideration had not failed. In *Bagueley v. Hawley*, L. R. 2 C. P. 625, a like decision was made, where the defendant resold to the plaintiff a boiler the former had bought at a sale under a distress for poor-rates, the plaintiff having knowledge at the time of his purchase that the defendant had bought it at such sale. In *Hall v. Conder*, 2 C. B. (N. S.) 22, the plaintiff, by an agreement in writing by which, after reciting that he had invented a method of preventing boiler explosions, and had obtained a patent therefor within the United Kingdom, transferred to the defendant "the one-half of the English patent" for a consideration to be paid. In a suit to recover the consideration the defendant pleaded that the invention was wholly worthless, and of no public utility or advantage whatever, and that

the plaintiff was not the true and first inventor thereof. On demurrer the plea was held bad, for that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent, such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. A like decision was made in *Smith v. Neale*, 2 C. B. (N. S.) 67.

Chief Justice Erle, in his opinion in *Eichholz v. Bannister*, describes *Morley v. Attenborough*, *Chapman v. Speller*, and *Hall v. Conder*, as belonging to the class of cases where the conduct of the seller expresses, at the time of the contract, that he merely contracts to sell such title as he himself has in the thing. The opinion is valuable, in that, while it rescues the common-law rule of implied warranty of title from the assaults of distinguished judges who held that caveat emptor applied to sales in all cases, and that in the absence of express warranty or fraud the purchaser was remediless, it also placed the rule under the just limitation that it should not apply where the circumstances showed that the sale purported to be only a transfer of the vendor's title. Expressions such as "if a man sells goods as his own, and the title is deficient, he is liable to make good the loss," (2 Bl. Comm. 451), or "if he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title," (2 Kent, Comm. 478,)—as a statement of the principle on which the doctrine of implied warranty of title rests, is not inconsistent with the principle adopted by Chief Justice Erle. Stating the principle in the negative form adopted in *Morley v. Attenborough*, that there is no undertaking by the vendor for title unless there be an express warranty of title, or an equivalent to it by declaration or conduct, affects only the order of proof. It was conceded in that case that the pawnbroker selling his goods undertook that they had been pledged, and were irredeemable by the pledgor, and if it be assumed, as I think it must be, that the act of selling amounts to an affirmation of title of some sort, but that its force and effect may be explained, qualified, or entirely overcome by the facts and circumstances connected with the transaction, the difference between *Morley v. Attenborough* and *Eichholz v. Bannister* will rarely be of any practical importance.

The limitation above mentioned upon the doctrine that the act of selling is an affirmation of title has been adopted in this state. In *Bogert v. Chrystie*, 24 N. J. Law, 57-60, this court held that the general rule that the vendor of goods having possession, and selling them as his own, is bound in law to warrant the title to the vendee, did not apply where the vendor sells with notice of an outstanding interest in a third party, and subject to that interest. In *Hall v.*

Hoagland, 38 N. J. Law, 351, the vendor agreed in writing to assign a lease he held upon certain premises, and to sell and transfer goods and chattels mentioned in a schedule. The premises were a licensed inn and tavern, and in the schedule of the articles sold were enumerated "the licenses of the house." The law under which the license was granted prohibited the transfer of a license, and in the purchaser's hands it would be void and valueless. The court held that that circumstance did not justify the purchaser in withdrawing from his contract; that there was no warranty by the vendor that the license, when assigned, would be of any value to the purchaser; and that the latter, having obtained by the assignment what he had bargained for, could not annul his contract unless he showed fraud or misrepresentation with respect to the subject-matter of the contract.

In *Bank v. Trust Co.*, 123 Mass. 330, the defendant had a contract with B., pledging to him certain tobacco, in which it was recited that the tobacco was B.'s own property, and free from all incumbrances, and made an assignment to the plaintiff "of all his right, title, and interest in and under the contract, with all the property therein mentioned." The tobacco was then in the defendant's possession, and was delivered by him to the plaintiff. Afterwards a third person demanded and recovered of the plaintiff part of the tobacco as his property, which had been pledged to the defendant without right. The plaintiff then sued the defendant on an alleged implied warranty of title. The court ruled adversely to the plaintiff's claim. In the opinion the court said that the written assignment did not purport to be a sale of the goods, but of all the defendant's right under the contract, and its obvious purpose was to substitute the plaintiff in the place of the original pledgee, and that the fact that at the time of the transfer to the plaintiff the goods were in the actual possession of the defendant did not vary the case.

In the case in hand the circumstances connected with the assignment, independent of the words "all our right, title, and interest," etc., contained in it, preclude the implication of a warranty of the validity of the contract. Taken in connection with the words of the assignment, the intention of the parties is free from doubt. * * *

IV. Implied Warranty in Sale by Description ⁹

GAGE v. CARPENTER.

(Circuit Court of Appeals of United States, First Circuit, 1901. 107 Fed. 886, 47 C. C. A. 39.)

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action for breach of warranty of quality of ice sold by defendant to plaintiff in bulk. There was judgment for plaintiff, and defendant appeals.

Before COLT, Circuit Judge, and ALDRICH and LOWELL, District Judges.

ALDRICH, District Judge.¹⁰ The controversy here relates to a sale of ice. According to the plaintiff's principal contention in argument before us, and according to the construction most favorable to him which we deem admissible, it was a sale of all the ice in five certain ice houses in Chelmsford. * * * For the price fixed the plaintiff became the owner by purchase of all the ice in the ice houses. * * * If the learned trial judge is to be taken as having permitted the jury, under the aid of parol evidence, to construe the contract as a sale of 5,748.70 tons of ice at one dollar per ton, we think he erroneously admitted parol evidence to vary the written agreement. We have to determine, therefore, whether, in a lump sale of specified ice under the circumstances mentioned, there arose an implied warranty that the ice was of merchantable quality, and we need only consider the exceptions which raise that question, for the reason that the plaintiff's right of recovery, if any, results from a warranty of that character; and, as we hold there is no implied warranty, all other questions become immaterial.

The evidence of the plaintiff below tended to show that a part of the ice in question turned out, as it was opened up, to be snow ice, and therefore unmerchantable, and the plaintiff claimed an implied warranty that the same was merchantable. As has been said the quantity of ice had been ascertained by survey at the time the contract was reduced to writing and the ice paid for; and therefore the claim of warranty, we think, relates to the quality of the mass, rather than to the question whether the mass was in part ice and in part snow. We do not, as argued here by the defendant in error, view the situation shown by the record as presenting a case where the commodity turned out to be not the thing named in the contract. True,

⁹ For discussion of principles, see Tiffany, Sales (2d Ed.) § 77.

¹⁰ Part of the opinion is omitted.

as claimed by the defendant in error, the sale was of ice, not snow; but snow ice, in the common acceptation of the term, is not snow. Snow ice results when the snow melts, and the snow water, or slush, held upon the surface of the river or pond ice, is frozen, thus forming an upper layer, or course, of ice of an inferior consistency, weight, and quality. Consequently it was all ice, and the controversy, therefore, reasonably enough we think, relates to the quality of the ice sold rather than to a question whether the vendor sold for ice a commodity which was not in fact ice, and delivered a thing not named in the contract.

It is somewhat difficult to reconcile the implied warranty cases, and state a general rule, with all the limitations and distinctions given in the books, and it is not necessary that we should attempt to do so. It is sufficient for the purposes of this case to determine whether an implied warranty was created by the written contract, construed in the light of the situation of the property and the relations of the parties thereto as shown by the material parol evidence; and it may be observed at the outset that the learned judge who presided at the trial treated the question as one of doubt, upon which he inclined to the view of the plaintiff below.

The property in controversy was in esse and in bulk, as ice is usually packed in large storehouses in large quantities, and consisted, as expressed in the written contract, "of all the ice stored in my five ice houses on the shore of Baptist or Hart's pond in South Chelmsford." The buyer met the seller at South Chelmsford, and looked over the property in the situation described before the contract of sale was completed, and it was bought, as the seller understood, to be sold again in the usual course of a general ice business in Providence. The ice was not harvested, packed, or stored by the seller, and at time of sale was so situated that it could not be inspected. For this reason the seller had had no opportunity of inspecting or determining the quality or condition of the ice beyond that of the buyer, and the buyer was informed that the seller had purchased it of the Lowell Ice Company, that he had never made any personal examination as to the quality or condition, and that all the information he had about it was derived from the persons of whom he purchased.

We do not think the law implies a warranty of quality under such circumstances. It does not stand like a case where the seller was silent as to his information or lack of information. It was equivalent to saying to the buyer: "You have all the information and all the opportunities for information that I have. You take your chances as to quality if you buy the property, which cannot be inspected, with notice that I have not inspected it, and have no knowledge and no opportunities of gaining knowledge as to its quality. You take your chances under the same conditions upon which I took my chances in buying." It does not stand like goods sold upon sample, where the goods must conform to the pattern, or like machinery, to be manufac-

tured for a certain purpose, or like goods in existence sold at the market price for a given purpose, without notice from the seller that he had no information as to the quality.

Quite likely the rule ought to be, and quite likely the rule is, that the law implies a warranty as to quality or as to defects not obvious, if the owner sells an article of merchandise at the market price, knowing it is to be used for a particular purpose, without any disclaimer as to his knowledge, opportunities of inspection, and information in respect to the same, and under circumstances where the buyer might fairly rely upon the seller's supposed superior knowledge, judgment, or skill, or where the seller disposes of goods manufactured by himself, or in which he deals, for the market value, and concerning which he had opportunities of inspection that the buyer did not have; but that question we need not pass upon, and we only refer to a supposed situation for the purpose of distinguishing the case under consideration. Suppose it were a piece of manufactured shafting that both parties were looking at,—an article manufactured for a certain purpose, and in respect to which they were talking about a sound price,—and the seller says: "I have no knowledge as to the soundness of the article in respect to latent defects. I did not see the steel or iron in the rough or while in the process of manufacture. I bought it yesterday, and the man told me it was all right." Would the law, under such circumstances, imply a warranty against latent defects? Is not the doctrine of implied warranty against latent defects in manufactured articles based altogether upon the idea of the superior opportunities of the manufacturer to discover defects in the process of manufacture, and the supposed superior opportunities and information of the dealer? Of course, if it should turn out that, although the piece of shafting was recently purchased, and although the seller had had nothing to do with the manufacture, that he, in fact, had knowledge or information, and had deceived, the law would afford redress in tort, but not in contract upon implied warranty.

The cases most relied upon as in favor of an implied warranty and a recovery are *Jones v. Just*, L. R. 3 Q. B. 197, and *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526. We cannot look upon *Jones v. Just* as in point upon the question before us. On the contrary, it differentiates itself from the case under consideration in this respect: That there was no disclaimer of knowledge as to quality or opportunity of inspection by the seller or its agents, and, moreover, the defect against which the implied warranty was held to exist was not a defect in quality existing in the original article or packing, but one created in transit by shipwreck, and wetting with salt water, on a voyage from Manila to Singapore, and repacking at that point.

We do not understand that the civil law maxim *caveat venditor*, which is based upon the idea that a sound or full price raises a war-

ranty that the goods are sound, has been fully adopted in common-law jurisdictions, although the harsh caveat emptor rule has been qualified somewhat, so that the warranty of the vendor as to quality exists where he sells property about which he assumes to have knowledge, or about which he alone has the means of knowledge, or under such circumstances as it is the policy of the law to charge him with knowledge; and, as said in *Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 3 Sup. Ct. 537, 542, 28 L. Ed. 86, 89: "According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own." In the same case Mr. Justice Harlan, in commenting upon *Parkinson v. Lee*, 2 East, 314, refers (at page 113, 110 U. S., page 540, 3 Sup. Ct., and page 88, 28 L. Ed.) to the observation of Chief Justice Tindal in *Shepherd v. Pybus*, 3 Man. & G. 868, that two of the judges participating in its decision laid "great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the hops, had as full an opportunity of judgment of the quality of the hops as the seller himself," and observes: "There was, consequently, nothing in the circumstances to justify the buyer in relying on the judgment of the seller as to the quality of the commodity." Mr. Justice Harlan also quotes approvingly (at least without adverse criticism) the rule given by Tindal, C. J., in *Brown v. Edgington*, 2 Man. & G. 279: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

In *Jones v. Just* it is said: "The buyer trusts the manufacturer or dealer, and relies upon his judgment, and not upon his own." This, we think, states correctly the general rule and the true principle of an implied warranty. It exists where the sale is under such circumstances as entitle the buyer to rely upon the skill and experience of the manufacturer, if the article is to be manufactured, or, if the goods are in existence, upon the knowledge and opportunity of inspection which the seller or dealer possesses, and which the buyer does not possess. But this rule is not broad enough to include a sale where both parties manifestly have the same knowledge and opportunities of inspection, and where the seller expressly states the situation to the buyer. It cannot be said that the buyer has a right to rely on knowledge or skill or opportunity of inspection which the dealer expressly informs him he does not possess.

In *Murchie v. Cornell*, 155 Mass. 60, 62, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526, Mr. Justice Holmes, in delivering the opinion of the court, said there was some evidence to show that the ice was not identified by the contract, and some to show that it was so identified, and that, under those circumstances, the trial justice had charged the jury that no warranty of quality existed. He continued: "If the instruction is wrong in either view which the jury might have taken of the facts, the exceptions must be sustained." The court thereupon held the instruction erroneous, as it undoubtedly was; for, if the ice was not identified by the contract, a warranty was plainly implied. The case decides nothing concerning a sale of specific ice like the sale here before us.

So it would seem that neither the English court in *Jones v. Just*, nor the Massachusetts court in the case last cited, had occasion to deal with a situation which involved the element of disclaimer and lack of knowledge and opportunity of inspection by the seller which is presented by the case in hand, and which we think clearly excludes the idea of an implied warranty. The judgment of the circuit court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings, and the plaintiff in error recovers her costs in this court.¹¹

EDGAR v. JOSEPH BRECK & SONS CORP.

(Supreme Judicial Court of Massachusetts, 1899. 172 Mass. 581, 52 N. E. 1083.)

Action by W. W. Edgar against the Joseph Breck & Sons Corporation. There was a verdict for plaintiff, and defendant brings exceptions.

The plaintiff is a florist and grower of flowers. He bought of defendant, a dealer in seeds, a bill of lily bulbs amounting to \$125. It is for a breach of warranty as to the kind of lily the bulbs would produce that this action is brought.

HOLMES, J.¹² This is an action for breach of a warranty that certain lily bulbs sold by the defendant to the plaintiff were of the kind known as "longiflorum." The case has been tried, and is here on exceptions.

The first exception to be considered is to a refusal to direct a verdict for the defendant. The plaintiff testified that the manager of the defendant's seed department spoke to him about supplying him with bulbs for the following Easter; that the plaintiff asked about the lilies being true to name, and that the manager replied that he would supply him with those true to name, whereupon the plaintiff gave him the order. Afterwards the bulbs were sent, and turned out to be in great

¹¹ Compare *Camplon v. Marston*, 99 Me. 410, 59 Atl. 548 (1904) and *Varley v. Whipp* [1900] 1 Q. B. 513.

¹² Part of the opinion is omitted.

part of an inferior variety (Harrisii), of which the bulb is not distinguishable from the longiflorum.

The defendant objected that the foregoing facts do not show anything importing a warranty, and, whatever their import, are no evidence of a warranty, because the sale was executory, and that the plaintiff's only remedy on such a contract would be for failure to deliver the goods; that the agreement, when made, was within the statute of frauds, and did not become binding until the delivery of the bulbs, which were sent with a bill having a printed notice that the defendant sold no seeds with a warranty; and that there was no evidence of the agent's authority.

As to the first of these objections, we do not think it necessary to say more than that it was a question for the jury. With regard to that based upon the sale being executory, the answer is that, when an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted, and the sale is complete. It might work injustice to treat an essential term of the contract as performed or waived at a time when the purchaser still is unable to tell whether it has been performed or not. *White v. Miller*, 71 N. Y. 118, 129, 27 Am. Rep. 13; *Shaw v. Smith*, 45 Kan. 334, 338, 25 Pac. 886, 11 L. R. A. 681. See *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367.

The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing. The statute of frauds could be satisfied later as effectually as at the time. It was satisfied by delivery of the bulbs. The general printed warning on the bill head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded, and a new one substituted, by mutual agreement. Even if the bill had been receipted, it would not have excluded proof of warranty, and, whether it was evidence of a rescission or not, it did not establish one as matter of law. *Atwater v. Clancy*, 107 Mass. 369; *Dunham v. Barnes*, 9 Allen, 352; *Hazard v. Loring*, 10 Cush. 267, 268. Perhaps *Lamb v. Crafts*, 12 Metc. (Mass.) 353, would prove reconcilable with the latter cases if the instrument then before the court were set out. The case is not like *Rope Co. v. Brigham*, 170 Mass. 518, 522, 523, 49 N. E. 1022, where a series of bills were sent and received without objection, containing a term as to which, so far as appears, there had been no previous agreement, and which, as pointed out by the court, was a proposition in favor of the buyer of the goods. In that case there was nothing to prevent a presumption of the buyer's assent.

Finally, we should hesitate to say that a contract which was within the authority of an agent so long as it was an executory contract for the sale of a thing of a certain kind ceased to bind the principal after

delivery, when it operated as a warranty that the thing was of that kind. But by declaring in set-off for the price of the bulbs, after notice of the alleged warranty by the declaration, the defendant affirmed the sale, whatever it turned out to be, and must take it with its burden.

* * * Exceptions overruled.

V. Implied Warranty of Quality¹³

COYLE v. BAUM.

(Supreme Court of Oklahoma, 1895. 3 Okl. 695, 41 Pac. 389.)

BURFORD, J.¹⁴ This was an action brought by Joe Baum against Coyle & Smith to recover damages alleged to have resulted to plaintiff's horses by feeding oats containing castor beans, which he had purchased from the defendants. There was a trial by jury, and verdict for plaintiff for \$570. The jury also returned special findings of fact. Motion for new trial was made and overruled, and judgment rendered on the verdict. The defendants bring the case here upon a petition in error. * * *

The uncontroverted facts were that the plaintiff purchased from the defendants 20 bushels of oats, for which he paid 35 cents per bushel, at the time of the purchase; that the defendants were at that time engaged in the feed business in Guthrie, in connection with the grocery business, and that plaintiff was, and for a long time had been, engaged in the livery business; that the oats were delivered him by the defendants on the day of the purchase, and placed in his livery barn; that his horses were fed from said oats that evening, three feeds the following day, and one feed on the following morning of the second day; that during the next day after the purchase of the oats some of his horses became sick; that he sent for a veterinary surgeon, who examined the horses, and found them suffering from poison. An examination was made of the oats the following morning, and they were found to contain considerable quantities of castor beans intermixed with said oats; that the plaintiff, on being informed of the fact that the beans were in the oats, went to the defendants' place of business and informed them that the oats which he had purchased from them had castor beans in them, and were unfit to feed his horses. They informed him that if he did not want the oats to bring them back, and they would pay him his money back. The unused portion of the oats were returned to Coyle & Smith's place

¹³ For discussion of principles, see Tiffany, Sales (2d Ed.) § 78.

¹⁴ Part of the opinion is omitted.

of business, and they weighed them out and paid the plaintiff 35 cents per bushel for the portion returned. Nothing was said at the time about the oats which had been used, nor was any express agreement made that the return of the oats and repayment of the purchase money should be in satisfaction of any damages resulting from the use of the oats which had been fed. * * *

The first ruling complained of is the action of the trial court in refusing to give instruction numbered 4, requested by the defendants. The instruction is as follows: "The buyer of an article upon an implied warranty of quality or fitness has two remedies upon the discovery of the breach thereof. He may either return the goods purchased, and demand the purchase money to be returned to him, or he may retain the goods and sue for his damages. The one remedy is exclusive of the other, and if you find from the evidence that the oats were sold by the defendants to the plaintiff upon the agreement or understanding that they were to be fed to the horses of the plaintiff, and that such oats contained castor beans, and that the plaintiff, after the discovery of that fact, returned said oats and received a return from the defendants of his purchase price, after knowing the dangerous consequences of their use, the plaintiff's election to receive a return of the purchase money for his oats would constitute a waiver of any right to prosecute this action for damages, and if you find such to be the fact, it will be your duty to return a verdict for the defendants."

This instruction does not contain a correct exposition of the law, as applicable to the case at bar. The question as to whether or not the return of the unused portion of the oats and a repayment of the purchase price for them was a satisfaction of the entire claim of Baum was a question for the jury to determine from all the facts and the intention of the parties. If all the oats had been returned, and the entire purchase price repaid, it would have presented a different question. The sale, as to the portion of the oats used, was not rescinded, and could not have been. The damage was done by the portion used, and not by the portion returned. It was a new and independent agreement to take back the oats not used, and repay the consideration, and could only be a repudiation of the former agreement to that extent; and in the absence of an agreement to settle the damages occasioned by the breach of the warranty as to the used portion, and as to which the sale had become absolute, the right of action would still exist. The authorities cited by counsel for plaintiff in error do not support their position.

The case of *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312, is relied on by plaintiff in error. In that case, *Thurber & Co.* agreed to sell *Alden* about 10,000 pounds of raspberry jam. They sent the jam to *Alden* at Boston, and he remitted to them \$1,000 in part payment of the agreed price. After the receipt of the jam, *Alden* claimed that it was not pure raspberry jam, as his contract called for, and wrote

Thurber & Co. to that effect. Thurber & Co. insisted that the jam was the kind they had agreed to furnish, but wrote to Alden that, notwithstanding that fact, as they still desired to retain his trade, they were willing to receive the whole lot back, and credit it up to him, together with the freight charges, and in this way settle the matter. Upon receipt of this letter Alden sent back all the jam, except one keg that he had sold, and requested Thurber & Co. to remit his money at once. Thereupon Thurber & Co. credited Alden with the jam returned, and the expense of freight and cartage, and remitted him the balance of the \$1,000. The court said: "This was a mutual rescission of the contract. The letter of the defendants was an offer to settle and compromise the controversy between the parties. The acts and conduct of the plaintiff was an adequate acceptance of that offer. This was a waiver of the right to sue for any preceding breach of the contract. The performance by the defendants of the new agreement operated as an accord and satisfaction for any breach, and discharged the old contract. Such was clearly the intention of the defendants, and the plaintiff accepted their offer unconditionally, and this induced them to perform it." The court bases its conclusion in the above case upon the ground that, by the agreement of the parties, the new contract was to be an entire settlement of the matters between them, and amounted to an accord and satisfaction,—a compromise.

There are none of the elements of a compromise in the case at bar, nor does the evidence present any of the elements of an accord and satisfaction. There was no agreement to settle anything. Coyle & Smith proposed to repurchase the unused oats, they were returned, and they weighed them out and paid for them at the original price. Nothing was compromised, and there was nothing else surrendered on either side. Coyle & Smith got back the same oats they sold, at the same price per bushel, except the portion which had done the damage, and nothing was said as to this portion, or as to a settlement or compromise of anything. The payment of a portion of an undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance, and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt. *Railroad Co. v. Davis*, 35 Kan. 464, 11 Pac. 421. In the case at bar there was no new consideration passed. The oats were presumably worth as much when returned as when originally purchased, and they were retaken at the original purchase price, and the exact amount returned, and no more paid for. Neither party mentioned the claim for damage occasioned by the portion not returned, and nothing was said as to a compromise, or a final or full settlement.

To constitute accord and satisfaction, that which is received by the creditor must be accepted by him in satisfaction, and whether there was such an acceptance is a question for the jury. *Frick v.*

Algeier, 87 Ind. 256; *Hardman v. Bellhouse*, 9 Mees. & W. 596; *Hearn v. Kiehl*, 38 Pa. 147, 80 Am. Dec. 472; *Telegraph Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744. The refused instruction states, as a proposition of law, that if Baum returned the oats, and received pay for same, such return and repayment was a bar to a recovery for damages. It did not submit the question to the jury, to be determined as a fact, whether or not there had been a compromise, or accord and satisfaction, and the court correctly refused to give it. *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122, cited by plaintiff in error, fully supports this doctrine. In that case the court says: "Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties to be ascertained from their correspondence and conduct." See, also, as supporting this position, *Peck v. Requa*, 13 Gray (Mass.) 407; *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Holmes v. Doane*, 9 Cush. (Mass.) 135; *Cooke v. Murphy*, 70 Ill. 96; *Moore v. Locomotive Works*, 14 Mich. 266.

In the case of *Thornton v. Wynn*, 12 Wheat. 193, 6 L. Ed. 595, the question before the court was "not whether the purchaser of a horse which is warranted sound has a remedy over against the vendor upon the warranty, in case it be broken, but whether, in an action against him for the purchase money, he can be permitted to defend himself by proving a breach of warranty." And on this question the court held to the ancient but now obsolete rule that the vendee must pay the purchase money, and was put to his separate action upon the warranty for his damages, unless it was shown that the vendor knew of the unsoundness of the horse, and the vendee tendered a return of it within a reasonable time. There are some dicta in the discussion of the case that would seem to support counsel's position, but the law of the case is not in conflict with the views we have expressed in the case under consideration.

In *Chapman v. Searle*, 3 Pick. (Mass.) 38, after there had been a sale and delivery of goods, there was an agreement to take the goods back and return the consideration. This agreement was never consummated. It was contended that this agreement was a rescission of the contract of purchase. The court said: "It was contended on the part of the defendant that the contract was rescinded by the original parties before the plaintiff's title accrued. If our view of the case is correct, the contract was executed, and was not merely executory, and so it could not be considered as rescinded, which must be understood as discharging or canceling it while it remained to be performed. Finally, it was contended for the defendant that there was a resale of the property by Ludlow to Whiting before the plaintiff's title accrued. But upon a careful review of the evidence, we can perceive only an agreement to reconvey at some future time, and upon certain conditions, which were never complied with before Ludlow was obliged to assign all his property to the plaintiffs." We

find nothing in the case last cited to support the contention of counsel for plaintiff in error. Upon the contrary, it supports the theory that the sale of the oats was an executed contract; and, there being nothing further to be done under the contract of sale, it could not be rescinded, and that the agreement by which a portion of the oats were returned was a resale or new agreement. The warranty found to have been made at the time of the sale of the oats is a collateral agreement, and not a condition of the sale, and this action is for a breach of the warranty, and not an action to enforce the contract. * * *

Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572, is a case relied upon by plaintiffs in error. This was an action by *Park et al. v. Richardson & Boynton Co.*, to recover damages for alleged defects in a furnace sold to plaintiffs, and placed in their storehouse for heating purposes. Under the contract of sale there was an express agreement that if the furnace failed to work satisfactorily the vendors would substitute a different size, or remove the furnace and refund the amount paid for same, at the election of the vendees. The furnace failed to work as agreed. The plaintiffs, in their petition, blended two causes of action, one for return of purchase money and the other for breach of warranty. The court held, on appeal, that the plaintiffs could not rely upon both remedies in one action; that they might rely upon their contract and return the property and recover their purchase money, or they could keep the property and sue for breach of warranty; that the two remedies were alternative under the terms of his agreement. The court further held that keeping and paying for the property was no waiver of the right to sue for damages for a breach of warranty.

We find nothing in this case to conflict with our view of the case at bar. The keeping and paying for the oats that had been fed before the discovery of their quality was not a waiver of any right to recover for damages occasioned by their use, and the resale of the unused portion to the original vendor, without any agreement or intimation by either party that such resale should be in satisfaction or settlement of such damages, is no bar to a recovery for breach of warranty. Every breach of warranty occasioning any damage or detriment gives a right of action to the party damaged, and such right of action continues in his favor until the same is satisfied, waived, or barred in some manner. There is nothing in the case at bar that shows any intent or purpose on the part of the parties to satisfy or waive this right, and we find nothing in the law or the acts of Baum that will bar such right.

Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881, is another case relied upon by counsel for plaintiffs in error. We find nothing in the case to support their contention. The Philadelphia Whiting Company sold to the white lead works 300 barrels of the best commercial whiting, to be used in manufacturing putty. After using several barrels of the whiting in the manu-

fracture of putty for their trade, they found it of an inferior quality, and so notified the vendors, and stored the remainder for the use of the vendors, and refused to pay for same. The vendors sued for the purchase price. The vendees set up the breach of contract and damages; and they recovered judgment against the vendors for \$509.20. The vendors appealed. The only questions determined by the appellate court were: (1) Where the contract for sale of goods is made by letter, such letter or letters are the only evidence that can properly be introduced to show what the contract between the parties was. (2) Where the character of the goods purchased is such that their quality cannot be determined by looking at and examining them, but by actual use only, the purchaser will be entitled to a reasonable time in which to test the goods and ascertain whether they are the kind ordered, and, until this question is determined, the retention of the goods does not amount to an acceptance thereof.

Evidently the foregoing case treated of a conditional sale, where the ownership of the property never passed to the vendees, and on the discovery of the inferior quality of the goods they had a right to reject the goods and refuse payment. It was not a rescission of the contract, but a refusal to consummate a contract. In said case it was contended, on appeal, that the trial court should have allowed the plaintiffs to recover for the value of the 42 barrels used by the vendees in testing the whiting, before they found out its inferiority. On this question the supreme court of Michigan said: "Had this been done, simple justice would have required the allowance to the defendant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least \$1,000. So that it clearly appears the plaintiff has not been injured by the action of the court on this point. Certainly the defendant derived no benefit from the amount used."

The principle announced above is applicable to the case at bar. Coyle & Smith received and retained pay for the portion of the oats that were used before their poisonous quality was discovered, and simple justice would require the allowance to Baum of the damages he sustained in the use he made of the oats that were fed to his horses. * * * Affirmed.

CARLETON v. LOMBARD, AYRES & CO.

(Court of Appeals of New York, 1896. 149 N. Y. 137, 43 N. E. 422.)

See ante, p. 176, for a report of the case.

BLACKMORE v. FAIRBANKS, MORSE & CO.

(Supreme Court of Iowa, 1890. 79 Iowa, 282, 44 N. W. 548.)

See ante, p. 183, for a report of the case.

MURCHIE v. CORNELL.

(Supreme Judicial Court of Massachusetts, 1891. 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526.)

Action by James Murchie et al. against Pardon Cornell et al. to recover for a cargo of ice sold by plaintiffs to defendants. Verdict for plaintiffs. Defendants appeal.

HOLMES, J. The plaintiffs agreed to sell, and the defendants agreed to buy, a cargo of ice of 360 tons, to be shipped from Pembroke, Me. From some of the evidence it would seem that the ice was not identified by the contract, but was to be supplied and appropriated to the contract by the plaintiffs, the sellers. From other parts of the testimony it might be inferred that the ice was identified by the contract, but at a time and under circumstances when the defendants had no opportunity to inspect it before shipment. The judge instructed the jury generally that there was an implied affirmation that the ice was of such a kind that it could be shipped, transported by sea, and discharged at New Bedford, as contemplated by the contract, and no other implied affirmation or warranty. If the instruction is wrong in either view which the jury might have taken of the facts, the exceptions must be sustained, and it is unnecessary to consider whether the implication would be more extensive in the former case than in the latter.

In some contracts of the latter kind, when the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manilla sugar" in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331.

But in many cases like the present the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more. How much more may depend upon circumstances, and at times the whole question may be for the jury. If a very vague, generic word is used, like "ice," which, taken literally, may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed. *Warner v. Ice Co.*, 74 Me. 475; *Swett v. Shumway*, 102 Mass. 365, 369, 3 Am. Rep. 471; *Whitmore v. Iron Co.*, 2 Allen, 52, 58.

In a sale of "Manilla hemp," like that of the sugar in *Gossler v. Eagle Sugar Refinery*, it was held in England that the hemp must be merchantable. *Jones v. Inst.*, L. R. 3 Q. B. 197; *Gardiner v. Gray*, 4 Camp. 144; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 351, 35 Am. Dec. 572; *Merriam v. Field*, 39 Wis. 578; *Fish v. Roseberry*, 22 Ill.

288, 299; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560. See *Hight v. Bacon*, 126 Mass. 10, 12, 30 Am. Rep. 639; *Hastings v. Lovering*, 2 Pick. 214, 220, 13 Am. Dec. 420.

2. The plaintiffs put in evidence tending to show that the defendants never notified them of any defect in the quality or condition of the ice until after this suit. To meet this, the defendants offered a protest, signed and sworn to by one of them on the day the ice arrived. This protest was no evidence that the statements contained in it were true, or that the defendants' story was not false. So far as the plaintiffs' evidence was introduced for the purpose of showing such an acceptance of the ice as to bar the defendants from alleging that it did not satisfy the contract, (*Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Gaylord Manuf'g Co. v. Allen*, 53 N. Y. 515, 519,) the protest, of course, had no bearing. And, although it did show that the defendants' story was not an afterthought, it was properly excluded, the plaintiffs, so far as appears, not having taken that specific point. *Wallace v. Story*, 139 Mass. 115, 29 N. E. 224.

Exceptions sustained.

VI. Implied Warranty in Sale by Sample ¹⁵

GOULD v. STEIN.

(Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455.)

Action by Henry A. Gould and others against Abe Stein and others for breach of warranty on the sale of certain rubber. Judgment for plaintiffs. Defendants except.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that these notes were intended to express the terms of the sale. They were carefully prepared and were read to the parties line by line, as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances. The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that, if there was any warranty, there was none which survived the acceptance of the goods by the plaintiffs; but the argu-

¹⁵ For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 79.

ment that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial; and there is no occasion to consider the further question whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods. The bought note, which the plaintiffs put in evidence, was of "148 bales Ceara scrap rubber, as per samples, viz., 46 bales of first quality marked 'A;' 102 bales of second quality." The controversy relates only to the 102 bales. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the 102 bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples, and the court found damages for the plaintiffs solely on the ground that the defendants failed to deliver rubber of the second quality; ruling that the broker's note contained an absolute warranty of second quality rubber. If this ruling was right, it disposes of the defendants' second and third requests for instructions. The general rule is familiar and admitted that a sale of goods by a particular description imports a warranty that the goods are of that description. *Henshaw v. Robins*, 9 Metc. 83, 43 Am. Dec. 367; *Harrington v. Smith*, 138 Mass. 92; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Osgood v. Lewis*, 2 Har. & G. 495; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Jones v. Just*, L. R. 3 Q. B. 197; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Bowes v. Shand*, L. R. 2 App. Cas. 455. And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct, though not absolutely uniform, grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus, in *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420, the words, in a sale-note, "Sold 2,000 gallons prime quality winter oil," were held to amount to a warranty that the articles sold agreed with the description; and in *Henshaw v. Robins*, 9 Metc. 87, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this commonwealth. So in *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203, it was held that where a manufacturer of flour marked it as of a particular quality, viz., "Trafalgar

Mills Extra Superfine," that amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 Pick. 57, 60; *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30; *Mader v. Jones*, 1 N. S. Law R. 82. In *Gardner v. Lane*, 9 Allen, 492, 85 Am. Dec. 779; *Id.*, 12 Allen, 39, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after being thus prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee; there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

Now, if the words "as per samples" had not been in the bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the insertion of those words raises the inquiry whether they limit the implied warranty of the vendor, so that if the rubber sold was equal in quality to the sample he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples" except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But if it is found that the bought note admits of a reasonable construction by which a proper significance can be given both to the words "as per samples" and also to the words "of second quality," there will be no occasion to disregard either.

Cases are to be found in the books where such a construction has been given to contracts of sale. Thus, in *Whitney v. Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo hides, with all faults, was held to mean with such faults and defects as the articles sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd v. Kain*, 5 Barn. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken

"with all faults, and without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have, the court saying by way of illustration: "Suppose a silver service sold with all faults, and it turns out to be plated." So, in *Nichol v. Godts*, 10 Exch. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not foreign refined rape oil, although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar. See *Wieler v. Schilizzi*, 17 C. B. 619; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Mody v. Gregson*, L. R. 4 Exch. 49; *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, L. R. 2 Q. B. Div. 102.

In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rubber. Construed thus, the article sold was 102 bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was in fact Ceara rubber. There was no question that it was of the right kind, but it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well-known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a twofold warranty; and, this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should conform to that description. *Henshaw v. Robins*, 9 Metc. 83, 43 Am. Dec. 367; *Jones v. Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense. *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Mody v. Gregson*,

L. R. 4 Exch. 49; *Nichol v. Godts*, 10 Exch. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance. For these reasons, in the opinion of a majority of the court, the entry must be: Exceptions overruled.

J. I. CASE PLOW WORKS v. NILES & SCOTT CO.

(Supreme Court of Wisconsin, 1895. 90 Wis. 590, 63 N. W. 1013.)

See ante, p. 172, for a report of the case.

PERFORMANCE OF CONTRACT

I. In General ¹

DAVIS v. GILLIAM.

(Supreme Court of Washington, 1896. 14 Wash. 206, 44 Pac. 119.)

Action by A. L. Davis against Lane C. Gilliam and J. B. Gilliam for breach of contract. From a judgment for defendants, and an order denying a new trial, plaintiff appeals.

GORDON, J. The complaint in this action alleges that on the 1st day of July, 1890, the appellant (plaintiff below) was the owner of about 800 head of horses, then on what is known as the "Crab Creek Range" in the counties of Adams and Douglas; that on that day he entered into a contract with the respondents, wherein and whereby he agreed to sell and deliver said horses to them at the rate of \$30 per head, the delivery of the horses to be made at the fall round-up of that year. Four thousand dollars of the purchase price was to be paid at the time of making the contract, and the balance in one, two, three, four, and five years. The first payment was to be made by promissory note in the sum of \$4,000, dated July 1, 1890, payable one year thereafter. The complaint also alleges that on or about the 1st of September, 1890, the fall round-up being about to take place, appellant notified the respondents that he was ready to deliver the horses, and requested them to attend at the range for the purpose of receiving them as counted, and that at that time he was ready to deliver the same and proceed with the contract, but that the respondents neglected and refused to receive or accept the horses, or proceed any further with the contract; that, at the time of the occurrence of the breach, the band of horses were not worth to exceed \$10,000 in value.

The respondents answered, denying the several allegations of the complaint, and alleging affirmatively that they were induced to enter into an agreement whereby the appellant agreed to deliver 800 horses of a certain kind and description to respondents on the 1st day of September, 1890, for which horses they agreed to pay \$30 per head; that on the 1st day of September thereafter they were ready and willing to receive and accept the horses in accordance with the terms of their contract of purchase, and for that purpose attended at the range where said horses were located, but that the appellant did not at that time deliver or offer to deliver said horses, or any of them; and, further,

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 80, 81.

that the representations of the appellant as to the description and kind of horses which he pretended to own, and to be able to sell and deliver to respondents, were false and fraudulent, etc.

The trial resulted in a verdict for the respondents, and from an order denying his motion for a new trial, and from judgment upon the verdict, the plaintiff has appealed.

The sole ground relied upon for a reversal is that the court erred in its charge to the jury, and in refusing to give particular instructions requested by the appellant. The respondents, while not conceding that any error was committed by the trial court either in giving the instructions complained of or in refusing to give others as requested by appellant, insist that the verdict is right under the evidence, and that the appellant failed to show any offer or readiness to deliver the horses in pursuance of the agreement; and, further, that it affirmatively appeared from the testimony that he was not in possession of the horses either at the time of the contract or at the time provided therein for a delivery of the horses, nor until nearly a year thereafter. "It is the practice of most of the courts, before passing upon exceptions to instructions, to look into the evidence, and see if the verdict was right, and, if it is found to be so, the court will look no further." *Thomp. Trials*, § 2403, and authorities there cited. After a careful examination of the entire record, we have reached the conclusion that this contention of respondents must be upheld. While detached portions might be construed otherwise, still, when considered as a whole, the testimony clearly and unmistakably shows that the appellant was never in a position to carry out his contract by delivering the horses prior to July, 1891, and that in the meantime about 100 of the band had been shipped out of the state, and disposed of.

Appellant's own testimony shows that, at the time of entering into the contract, the horses were in the possession of one Glasspoole, who claimed an interest in them; that one of the respondents, at appellant's request, accompanied appellant to the range where the horses in question were located at or about the time of the round-up, but that appellant was unable to deliver any of the horses to respondents at that time because of the refusal of Glasspoole to surrender possession of them; that thereupon they returned to the city of Spokane, distant some 75 miles from the range, where, on the 27th day of August, 1890, the appellant entered into a written contract with Glasspoole, a copy of which contract was attached to the deposition of Glasspoole, and put in evidence by appellant. This contract recited that the property, to wit, "a certain band of horses, supposed to contain about 800 head, * * * now on the Crab Creek range, etc., are part of the same band and its increase bought by the first and second parties [Glasspoole being party of the first part, and the appellant party of the second part, to said contract] and John Davis from J. L. Dow," etc. In said contract said Glasspoole agreed to sell his interest in and to said property to the ap-

pellant, in consideration of the appellant's delivering to Glasspoole respondents' note for \$4,000, and a bond of appellant with sufficient sureties to insure the prompt payment to said Glasspoole of said note at maturity. This contract also provided that Glasspoole should remain in possession of the horses until their exact number should be ascertained by counting, etc., and until payment was made as therein provided. It further appears from the testimony of appellant that the \$4,000 note (executed by respondents), which, under the terms of the contract with Glasspoole, appellant was required to deliver to Glasspoole before he could obtain possession of the horses, was at that time held by the First National Bank of Walla Walla, where appellant had theretofore pledged it as collateral to his own note for something over \$3,000; and it further appears that, up to the time of the trial, he had not procured the return of said \$4,000 note; and that Glasspoole continued in the possession of all of the horses until July, 1891, in the meantime shipping about 100 of the horses out of the state to the state of Illinois, where they were sold.

Such was the condition of the case made by the appellant. It seems plain that, to entitle the appellant to a recovery, the testimony should have shown an ability upon his part to deliver the horses in question in accordance with the terms of the contract. The undisputed proof, as we think, however, shows that he was wholly unable to make a delivery because of the interest which Glasspoole owned in the horses, coupled with his refusal to surrender possession of them. It follows that, if any error was committed in the charge of the court, it was wholly immaterial. It is a familiar rule that a good verdict cures all errors and irregularities in the proceedings, and that errors growing out of a charge are always to be disregarded when "the verdict is so plainly in accordance with the evidence that it follows as a conclusion of law thereon." *Thomp. Trials*, § 2403. It appearing to us, from a consideration of the entire record, that substantial justice has been done, the judgment appealed from will be affirmed.

II. Delivery of Wrong Quantity ²

BROWNFIELD v. JOHNSON.

(Supreme Court of Pennsylvania, 1889. 128 Pa. 254, 18 Atl. 543, 6 L. R. A. 48.)

See ante, p. 108, for a report of the case.

² For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 86-88.

III. Delivery by Installments³

PROVIDENCE COAL CO. v. COXE.

(Supreme Court of Rhode Island, 1896. 19 R. I. 380, 582, 35 Atl. 210.)

Action by the Providence Coal Company against Coxe Bros. & Co. Judgment for plaintiff. Defendants move for a new trial.

MATTESON, C. J. This is assumpsit on a written contract, of which the following is a copy: "Providence, July 2nd, 1892. Sold Providence Coal Co., to be shipped to Providence, R. I., 10,000 tons Beaver Meadow pea coal, @ \$1.85 per ton f. o. b. Cash, 30 days. Not insured. To be shipped, viz.: Barge load immediately; balance in equal monthly proportions before Feby. 1st, 1893; subject, however, to strikes, or any other unavoidable delay caused in shipping same. Coxe Bros. & Co., per F. J. Hartshorne." A jury trial was waived, and the case heard by the common pleas division. Decision in favor of the plaintiffs was given for a part of their claim, whereupon the defendants filed their petition for a new trial, alleging that the decision was erroneous.

We think the common pleas division erred in holding the contract to be severable. It is a single contract for the sale of one entire quantity of coal, to wit, 10,000 tons. The subsidiary provisions relative to shipments and payment did not have the effect to split it into as many distinct contracts as there were to be separate shipments or deliveries. *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 29 L. Ed. 366; *Iron Co. v. Naylor*, 9 App. Cas. 434. The common pleas division found, on the evidence, that the plaintiffs, though constantly urged by the defendants to furnish barges for the transportation of the coal according to the custom and course of dealing between them, or to allow the defendants to procure barges for that purpose for the plaintiffs, did not do so, and did not take the coal which was by the terms of the contract to be shipped in the months of July, August, September, October, and November, but received only 572.2 tons out of the proportions for those months, shipped with an installment of coal purchased under a former contract.

We think that each neglect of the plaintiffs to take the shipments of coal for the months mentioned was a breach of the contract which warranted the defendants in canceling it, in the absence of facts tending to show a waiver of the right of the defendants to insist upon such breaches, or some legal justification on the part of the defendants for such breaches. *King Philip Mills v. Slater*, 12 R. I. 82, 90, 34 Am. Rep. 603. The declaration, which consists of a single count, avers no

³ For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 89.

facts showing, or tending to show, a waiver by the defendants of their right to insist on the cancellation of the contract for the failure of the plaintiffs to take the proportions of coal stated, nor any legal excuse for the failure, but avers a readiness and willingness at all times, of the plaintiffs, to receive and pay for the coal according to the contract. This affirmation of the declaration being negatived by the evidence, and the plaintiffs themselves having been in default, it is clear that they were not entitled to recover damages for the refusal of the defendants to ship the proportions of coal for the months of December and January.

We think the common pleas division erred in its decision awarding such damages. New trial granted, and case remitted to the common pleas division.

On Rehearing.

The case which the plaintiffs seek to raise by their reargument, and which they also attempted to make on the original hearing, is not the case made by the declaration. Our opinion was rendered on the declaration as it is framed. The declaration avers a readiness and willingness of the plaintiffs at all times to receive the installments of coal which the contract required them to receive, and claims damages for the refusal of the defendants to deliver the coal according to the contract. The common pleas division found, on the evidence, that, though constantly urged by the defendants to take the coal to be shipped in July, August, September, October, and November, 1892, the plaintiffs neglected to do so, and received but a small portion of one installment, shipped with coal under a former contract. The plaintiffs thus being in default, we held that on the declaration, as framed, averring their readiness and willingness at all times to receive the coal according to the contract, and claiming damages generally as for an entire breach of the contract, they were not entitled to recover for the refusal of the defendants to ship the installments of coal for the months of December, 1892, and January, 1893.

We see no reason to change our decision. It seems to us that, to raise the question which the plaintiffs seek to raise, the declaration should set forth that though the plaintiffs neglected to send for and receive the coal required to be shipped during July, August, September, October, and November, 1892, and though the defendants were entitled to rescind the contract on that account, they nevertheless did not rescind it, but treated it as continuing in force, and therefore were bound to deliver to the defendants, on their demand, the installments of coal for December, 1892, and January, 1893, and that, though the plaintiffs demanded the installment which the defendants were so bound to deliver in December, 1892, the defendants refused to deliver the same, and to deliver any coal under the contract, etc.

The plaintiffs suggest that the averment in the declaration of a readiness and willingness on their part to receive the coal may be

regarded as immaterial, and rejected as surplusage. We do not think that it can be so treated. The declaration proceeds on the theory that the contract was an entire contract. In that view, the averment of a readiness and willingness to receive the coal, or, in other words, to perform the contract by the plaintiffs, was a condition precedent to the right to recover. The case which the plaintiffs now seek to establish is that the contract, though an entire contract, is so far separable that its installments or deliveries may be treated as separate or independent stipulations of the contract, so that the plaintiffs are entitled to sue, notwithstanding the fact that they were not ready and willing to perform the entire contract on their part, for such of the installments as they had been ready and willing to receive, because the plaintiffs had not elected to treat the contract as at an end, and had not rescinded it, before the demand by the plaintiffs for an installment of the coal deliverable under the contract at the time of the demand.

CRESSWELL RANCH & CATTLE CO. v. MARTINDALE.

(Circuit Court of Appeals, Eighth Circuit, 1894. 63 Fed. 84, 11 C. C. A. 33.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by William Martindale and Thomas J. Price against the Cresswell Ranch & Cattle Company, Limited, for a breach of contract to deliver cattle. The district court rendered a decree for the plaintiffs. Defendant appeals.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. If the vendee of personal property, to be delivered and paid for in installments, refuses, upon the demand of the vendor, to accept and pay for a substantial part of an installment according to the contract, will the fact that he does so in good faith, and in the belief that he is not required by the contract to receive any of the property so rejected, deprive the vendor of his right to refuse to further perform the contract on his part? This is the principal question presented by this case.

September 19, 1892, the Cresswell Ranch & Cattle Company, Limited, a corporation, the plaintiff in error, sold to William Martindale and Thomas J. Price, the defendants in error, 5,021 steers, 1,321 of which were to be delivered not later than October 20, 1892, and the remaining 3,700 at the rate of 1,000 each week, commencing October 24, 1892. The vendees agreed to pay \$28 per head for the cattle, and at the date of the contract paid \$5,000, which was to be applied to the payment for the cattle as they were delivered at the rate of \$1 per head. The 3,700 cattle were part of a herd of cattle owned by the vendor that was on a range in Texas, 40 miles square, and the

contract provided that when any installment of these cattle was ready to load upon the cars the vendees should be notified, and might cut out any of the steers gathered that did not weigh 900 pounds. After the 1,321 cattle and two installments of the 3,700 had been delivered and paid for, making in all 2,289 steers, the parties met on November 14, 1892, for the fourth delivery, and the vendor tendered, and demanded that the vendees should receive, 980 steers that weighed over 900 pounds each, and that complied with the other requirements of the contract. The vendees cut out and refused to accept or pay for 282 of these cattle, on the ground that they did not weigh 900 pounds each, but accepted and paid for the remaining 698. Before the time for another delivery arrived, the vendor notified the vendees that they had violated the contract on their part by rejecting the 282 steers, and that the cattle company would deliver no more cattle to them thereunder. The vendees then brought this suit for damages for the failure of the vendor to deliver the remainder of the cattle specified in the contract, and for the balance of the \$5,000 not yet applied to the payment for the cattle already delivered. The vendor answered that the vendees had committed the first breach by failing to receive and pay for the 282 cattle tendered November 14, 1892.

At the close of the trial the court instructed the jury, in effect, that the mere fact that the vendees refused to accept the steers that complied with the contract on November 14, 1892, did not relieve the vendor of its obligation to make tender of the remainder of the 5,021 steers due under the contract, if the jury further found that the vendees made the rejection in good faith, in the belief that the rejected steers did not come up to the requirements of the contract. The court also refused to charge, as requested by the vendor, that the rejection of these steers entitled it to treat this action as a breach of the contract, and that, if the vendor notified the vendees that it so elected in a reasonable time after the rejection, the latter could not recover. The court also instructed the jury that, although they found that the vendor tendered and the vendees refused to accept cattle that fulfilled the requirements of the contract, yet, if the vendor had subsequently waived that breach of the contract, the vendees could recover damages for the failure of the vendor to make the subsequent deliveries. There was a verdict and judgment for the vendees for damages for the failure of the vendor to deliver the steers due subsequent to November 14, 1892. But the jury found that the 282 steers tendered and rejected on that day fulfilled the requirements of the contract, and gave the vendees no damages on account of those steers. The verdict does not disclose whether the jury found that the vendees' breach of the contract on November 14, 1892, was excused because they made it in good faith or because the vendor had waived it.

The contract on which this action was based was an entire contract. It was a contract for the sale of 5,021 cattle for \$140,588, and the \$5,000 earnest money paid at the time the contract was made was paid

on account of the entire purchase. The subsidiary provisions of the contract, that the price was \$28 for each steer, and that there were to be five deliveries of the cattle, no more made as many contracts of this one as there were to be installments of cattle delivered than it made as many as there were cattle to be delivered. *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366; *Iron Co. v. Naylor*, 9 App. Cas. 434, 439. Nor was the vendees' breach of this contract slight or in an immaterial part. It was substantial, and went to the very root of the contract. It consisted in their refusal to accept 282 cattle, and to pay \$7,896 for them, at the time and place they agreed to accept and pay for them under the contract. These cattle had been gathered by the vendor from a range 40 miles square by the labor of many men for many days and driven near to the railroad station to be delivered to the vendees. Their refusal to take them imposed upon the vendor the necessity of gathering other cattle from this extended range in the same manner to carry out its contract in the face of the fact that the vendees had refused to accept nearly three hundred cattle that complied with its provisions. A plaintiff cannot maintain his action for the breach of a contract made with him by a defendant unless he can establish such performance on his part as will entitle him to demand performance of the defendant. A prior substantial breach of the contract on the plaintiff's part is ordinarily a conclusive answer to an action for a subsequent breach on the defendant's part. In their complaint the vendees recognized this principle, and alleged that they "have in all things kept and performed the said contract upon their part," but that the cattle company, on November 19, 1892, refused to perform on its part.

The verdict does not rest, however, upon proof of this prior performance on the part of the vendees, but upon the facts that, before they charge any breach upon the cattle company, they had themselves failed to perform a substantial part of the contract, but that they then in good faith believed that they were not so failing. Nor was this exercise of good faith and belief by mistake, or without notice of the fact. It was a willful and determined exercise of faith. The vendor insisted, at the time, that these cattle weighed over 900 pounds each, weighed some of them in the presence of one of the vendees on some defective scales that indicated that its claim was well founded, and demanded that the vendees should accept them. All this may not have demonstrated the weight of the cattle, though it seems to have proved it to the satisfaction of the jury, but, although the judgment of the vendor's agent was liable to be at fault, and although the scales were defective, this was ample warning to the vendees to determine the weight of these cattle in some way correctly before they rejected them. They had, by the express terms of the contract, reserved to themselves the exclusive privilege of rejecting cattle that did not in fact weight 900 pounds, and by that very provision they had imposed

upon themselves the duty of determining the fact, and of rejecting, at their peril, those whose weight exceeded that amount.

The provision of the contract which presents this question is that the vendees may cut out "any objectionable steer that may not weigh 900 pounds." It was perfectly competent for these parties to this contract to have provided in it that the vendees might cut out and reject any steer that in their judgment weighed less than 900 pounds, or any steer that they in good faith believed weighed less than 900 pounds. This they did not do. They provided that the vendees might cut out those steers that in fact weighed less than 900 pounds each. There is a well-known and accurate standard and method for measuring the weight of cattle and most mercantile commodities, and contracting parties know when they make their contracts what the standard is, and what the method is, and that neither of them will probably change. But there is no accurate test, standard, or method by which the belief of vendees as to the weight of the articles they purchase can be measured, and no one can know in advance what such a belief may be. The belief of the defendants in error in this case was, according to the verdict of the jury, too far from the fact to authorize its substitution in this contract for the actual weight, for out of 980 cattle that weighed over 900 pounds each they believed that more than 28 per cent. of them weighed less. To substitute in this contract, for the actual weight, the judgment or belief in good faith of the vendees on that subject as the standard by which to determine what steers were heavy enough to comply with the terms of the contract, would be to make a new contract for these parties,—a contract they neither made nor intended to make, and one which the verdict shows would have been far more beneficial to the vendees than was the actual contract. It is not claimed that this can be done.

But it is insisted that, although the good faith and belief of the vendees cannot be made the standard to determine the existence of the breach of this contract, yet they may be interposed to deprive that breach of some of its ordinary legal effects. But that as effectually makes a new contract for the parties as to substitute the vendees' belief as to the weight for the actual weight. The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the acts stipulated. One of the rights of the vendor under this contract was to refuse to perform subsequent acts stipulated after the vendees had refused to perform a substantial part of the contract on their part. This right is given by the law for his protection to the party to a contract against whom the first breach has been committed. No sound reason occurs to us why its existence should be made dependent on the good faith or belief of him who first breaks the contract. On the other hand, there are cogent reasons to the contrary.

First. It is the breach itself, and not the good faith or belief of the party who commits it, that causes and measures the damage of

the injured party. The injury to the vendor in the case before us was not less because the vendees broke the contract in good faith, in the belief that they were not breaking it. Nor did the fact that they broke it in good faith, in the belief that they were complying with it, raise any presumption that they would not continue to do so. On the other hand, this fact presented the guaranty of word and of act that they would continue to break it.

Second. The rights and remedies of parties for breaches of civil contracts ought not to depend on the good faith and belief of those who violate them, because these are so difficult to ascertain. The proof of the existence or absence of such good faith and belief is peculiarly within the knowledge and control of the violators themselves. Frequently they alone know what they believe, and whether or not they are acting in good faith. It would always be difficult, and often impossible, to establish their bad faith or their belief that they were violating their contracts, without their testimony, and generally impossible to do so with it. The rights and remedies of parties for the breach of civil contracts ought not to be so placed at the mercy of those who break them. It would be intolerable that parties to continuing contracts should be compelled to perform them on their part until they could prove that the other contracting parties, who were constantly breaking them, were doing so in bad faith, and in the belief that they had no right to do so.

Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform. *Norrington v. Wright*, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Rolling-Mill v. Rhodes*, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; *Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co.*, 3 C. C. A. 248, 52 Fed. 700, 703, 10 U. S. App. 465, 470; *Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Smith v. Lewis*, 40 Ind. 98; *Hoare v. Rennie*, 5 Hurl. & N. 19; *Pope v. Porter*, 102 N. Y. 366, 371, 7 N. E. 304; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333, 344, 7 N. W. 357; *Reybold v. Voorhees*, 30 Pa. 116, 121; *Stephenson v. Cady*, 117 Mass. 6, 9; *Branch v. Palmer*, 65 Ga. 210; *Fletcher v. Cole*, 23 Vt. 114, 119.

In *Norrington v. Wright*, *supra*, most of the authorities cited by counsel for the defendants in error in this case in support of their contention that the failure of the vendees to accept a part of one installment of the cattle would not authorize the vendor to refuse to make the subsequent deliveries, are carefully reviewed, and disap-

proved or distinguished from cases like that before us. It would be idle to review them here again. In that case 5,000 tons of iron rails were sold to be shipped at the rate of about 1,000 tons per month. The vendor shipped 400 tons the first month and 885 tons the second, when the defendant refused to accept the rails, because the shipments had been less than 1,000 tons per month. The vendor shipped the remainder of the rails, and sued for damages for the failure of the vendee to accept them. The supreme court held that he could not recover, and stated the rule to be: "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

An attempt is made to distinguish this case from that at bar, because in the former the default occurred in the delivery of the first installment, and in the latter in the acceptance of the fourth installment. But it is a distinction without any substantial difference. The reason why the vendor could not recover in *Norrington v. Wright* was that he had committed the first breach of the contract, and that relieved the vendee from subsequent performance on his part. For the same reason the breach committed November 14, 1892, relieved the cattle company from any subsequent performance on its part. If a default on the first installment by one party relieves the other contracting party from the performance of all the stipulations of the contract, by so much the more will a default on a later installment relieve him from all subsequent performance. It is the first breach which he commits, and not the number of the particular installment to which it relates, that defeats the plaintiff, in these actions. Thus in *Robson v. Bohn*, *supra*, a contract was made May 19, 1873, for the sale of 425,000 feet of lumber, to be delivered at the rate of 20,000 feet per week from the date of the contract, and the defendant agreed to give his promissory note for \$3,000 at that time, to pay \$2,000 in cash August 1, 1873, and to pay the balance on the full delivery of the lumber. He gave his note for \$3,000. The vendor delivered the lumber weekly until August 1, 1873. The vendee then failed to pay the \$2,000 in cash, and the court held that the refusal of the vendee to pay the \$2,000 excused the vendor from the delivery of any lumber subsequent to August 1st. To the same effect are *Dwinel v. Howard* and *Reybold v. Voorhees*, *supra*. The rule is general that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform, and it rules this case.

Finally, it is contended that the cattle company waived the breach committed by the vendees, and that, even if there was error in the instruction we have been considering, it was error without prejudice, and the judgment should be affirmed. The claim of a waiver rests

upon the fact that the cattle company received payment November 14, 1892, for the 698 cattle that the vendees accepted, and the claim that its agent then told the vendees to come at some later date for more cattle, and arrange to gather and deliver them. It is difficult to see how the cattle company waived any of its rights by insisting upon its acknowledged right to deliver and receive payment for the 698 cattle the vendees accepted, especially in view of the fact that these cattle were, according to the verdict, worth several hundred dollars more than the contract price which the vendees paid for them, and they could have lost nothing by taking them. If the company had received payment for the 282 cattle that were rejected, there might have been some ground for the claim of waiver here. Nor is it easy to see how the statement that the vendees might come at some future day for more cattle, or any action the vendor took to gather and ship them, could work a waiver, when the cattle company notified the vendees, before they started to come for these cattle, that they need not do so, and that it would deliver no more cattle to them under this contract. There seems to be nothing in all this that could have induced the vendees to act or omit to act to their prejudice. We have grave doubts whether the evidence in this case is sufficient to sustain a verdict of a waiver of this breach by the cattle company if it were rendered.

But it is unnecessary to determine that question here. That question, and the question whether or not the vendees committed the breach in good faith, in the belief that the rejected steers did not comply with the requirements of the contract, were submitted to the jury under instructions to the effect that, if they answered either in the affirmative, the vendees could recover, although they did commit the first breach of the contract. The verdict shows that the jury found that the vendees committed the first breach, and that they must have answered one of these two questions in the affirmative. But it does not show which one. Such a verdict cannot be upheld where there is more than one issue tried, and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *Coal Co. v. Johnson*, 6 C. C. A. 148, 56 Fed. 810; *State of Maryland v. Baldwin*, 112 U. S. 490, 492, 5 Sup. Ct. 278, 28 L. Ed. 822.

There are other questions discussed in the briefs, but, as the case must be retried, and these questions may not arise upon a second trial, it is unnecessary now to notice them. The judgment is accordingly reversed, with costs, and the cause remanded, with directions to grant a new trial.

IV. Delivery to Carrier⁴

WHEELHOUSE v. PARR.

(Supreme Judicial Court of Massachusetts, 1886. 141 Mass. 593, 6 N. E. 787.)

This was an action of contract to recover \$440.22 for a lot of leather sold to defendant. Hearing in the superior court, which found for the plaintiff, and the defendant appealed. The facts appear in the opinion.

DEVENS, J. Where goods ordered and contracted for are not delivered directly to the purchaser, but were to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or where no agreement be made, or directions given, to be transported in the usual mode; or where the purchaser, being informed of the mode of transportation, assents to it; or where there have been previous sales of other goods to the transportation of which, in a similar manner, the purchaser has not objected,—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu. This proposition assumes that proper directions and information are given the carrier as to forwarding the goods. *Whiting v. Farrand*, 1 Conn. 60; *Quimby v. Carr*, 7 Allen, 417; *Finn v. Clark*, 10 Allen, 484; *Finn v. Clark*, 12 Allen, 522; *Downer v. Thompson*, 2 Hill (N. Y.) 137; *Foster v. Rockwell*, 104 Mass. 170; *Odell v. Boston & M. R. R.*, 109 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252.

The defendant had made a purchase of leather in November previous to the purchase of that the price of which is in controversy, under a direction to plaintiff to "ship to care of D. and C. Melver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston, direct." This shipment was made as ordered, and on December 3, 1884, the defendant sent a further order saying: "As regards the shipping of the leather, just received, you have done everything satisfactory. Ship this order in like manner,"—adding some directions as to marking the packages, not here important.

The directions by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to Melver & Co., to be transported by them by the Cunard line, of which they were managers and agents. The words "their next steamer" could not have meant any steamer which would accept freight from Melver & Co. Cases may be readily imagined where these words would be

⁴ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 90, 91.

of the highest importance; as if the defendant had an open policy of insurance protecting his goods, which might be sent by the Cunard line. It might also be true that defendant would not deem a policy of insurance necessary where goods were sent by a well-established passenger line, where greater precautions might probably be taken for safety, which he would deem necessary when they were sent by a purely freighting steamer. The goods were actually forwarded to McIver & Co., with instructions in conformity with the directions of the defendant; and, had the matter ended there, so far as any direction to McIver & Co. is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions as given to him by defendant, or authorized the carrier to transport them in a different mode from that directed by defendant, and loss has thereby occurred, he cannot claim that they were delivered to defendant by him. By continuing to exercise dominion over them, and by giving a new direction, impliedly withdrawing the directions previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the direction given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from McIver & Co., after the goods had reached them, inquiring whether they were to keep the goods "for our steamer on the 14th, or ship by the Glamorgan," ordered them to be shipped by the steamer arriving out first, presumably the steamer which McIver & Co. believed would be first to arrive. The Glamorgan was not a steamer of any line of which McIver & Co. were owners or agents, and in no way answers the description of "their steamer" as applied to McIver & Co. By neglecting to limit the authority of McIver & Co. to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods; and if correct directions had originally been given, had withdrawn them, and substituted others. When, therefore, exercising the authority thus given by plaintiff, McIver & Co. sent by the Glamorgan, as being, in their judgment, the steamer likely to arrive the first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed. Judgment for defendant.

KELSEA v. RAMSEY & GORE MFG. CO.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415.)

Action on a contract by Joseph U. Kelsea against the Ramsey & Gore Manufacturing Company. Plaintiff had judgment, and defendant brings error.

VAN SYCKEL, J.⁵ It appears in the case that the defendants, who live in Paterson, N. J., made a valid contract in March, 1890, with the plaintiff, who is a bobbin manufacturer in New Hampshire, under which the latter was to manufacture 6,000 bobbins and send them to the defendants at Paterson. The following are the controlling facts in the case: The contract was made in March, 1890, and the plaintiff at once commenced to make the bobbins. On the 28th of March, 1890, the defendants wrote to one Wilkins, who had introduced them to the plaintiff, requesting him to tell the plaintiff to stop the order for the time being. It does not appear that the contents of this letter were communicated to the plaintiff. On the 29th of March, 1890, Wilkins replied to the letter of the defendants, asking them to explain why they wished to have the order canceled. The case shows no reply to this letter. On the 6th of June, 1890, the plaintiff shipped to defendants by railroad 1,400 bobbins, and on July 25, 1890, the balance of the 6,000 were shipped in same way. Both lots arrived safely in Paterson, and on the 14th of August, 1890, the defendants wrote to the plaintiff that they would not accept or pay for them. This suit was instituted to recover the price agreed upon when the order was given. * * *

The third ground of defense is that the order to stop for a time terminated the plaintiff's right to fill the order, but to this I cannot agree. His right, under the contract, was to proceed at once with the manufacture of the goods, and to make delivery within a reasonable time. The defendants had no right to require him to stop temporarily, and could not, by such notice, change the plaintiff's rights under the contract.

The fourth ground relied upon by the defendants is the debatable one, and that is that there was no acceptance by the defendants, and therefore that the title did not pass to defendants, and the price consequently cannot be sued for; that the only remedy of the plaintiff is an action of damages for nonacceptance. If the question in this case was whether there was delivery and acceptance to take the case out of the statute of frauds, it would be clear that the plaintiff could not recover, for there was a refusal to accept. In this case the contract is conceded to be a valid contract in writing, and the question presented is the narrower one, whether there was such a delivery as passed the title to the vendees, so that they may be held for the pur-

⁵ Part of the opinion is omitted.

chase price. The vendor claims that the delivery of the goods to the common carrier constituted a delivery to the purchasers, and passed the title to them, subject only to the right of stoppage in transitu. It is not asserted that the receipt by the carrier constitutes acceptance by the vendees; it is only a delivery, not an acceptance. That the carrier, in the absence of authority to accept, represents the purchasers only to receive and forward.

Although the cases upon this subject are not entirely in accord, the authorities generally hold that a delivery to a common carrier of the goods, properly addressed to the vendee, is a delivery to the vendee, subject to the vendor's right of stoppage in transitu, and to the vendee's right to reject for nonconformity to the contract. *Brown v. Hodgson*, 2 Camp. 37; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Dunlop v. Lambert*, 6 Clark & F. 600; *Fragano v. Long*, 4 Barn. & C. 219; *Dawes v. Peck*, 8 Term R. 330; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Silver Plate Co. v. Green*, 72 N. Y. 17; *Spencer v. Hale*, 30 Vt. 316, 73 Am. Dec. 309; *Stanton v. Eager*, 16 Pick. 467; *Hunter v. Wright*, 12 Allen, 548; *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; 1 Benj. Sales, §§ 161, 181; *Story, Sales*, § 306; 2 Kent, Comm. 499. The distinction is made in some of these cases that, in order to give to the delivery to the carrier the effect of a delivery to the buyer, the carrier must be selected or named by the buyer. When the contract of the manufacturer is simply to make the goods at an agreed price, he has fully executed the agreement on his part when the goods are produced at his factory, ready to be delivered on demand. In that case, however, he is not authorized by the vendee to deliver them for transportation. But when the purchaser instructs the vendor to send the goods to him it does not appear how it makes any difference in the rule applicable to the case whether he names the carrier or not. If the carrier is not specified, the vendor, acting in this respect under the order of the purchaser to forward the goods, is his agent in the selection of the carrier, and in either case the carrier is, in contemplation of law, chosen by the purchaser.

In this case the purchasers expressly instructed the plaintiff to send the goods from New Hampshire to Paterson. When the goods passed out of the possession of the plaintiff into the hands of the carrier, who must be regarded as the agent of the purchasers to transport them, the transfer of the title to the purchasers became complete, and all the rights of ownership in them passed to the purchasers. If the carrier had converted the goods to his own use, the defendants could have maintained an action for them; or if there had been a loss in transit it would have fallen on them. In my opinion, therefore, the vendor was entitled to recover the contract price, and the judgment below should be affirmed.

V. Buyer's Right to Examine Goods⁶

MURPHY v. SAGOLA LUMBER CO.

(Supreme Court of Wisconsin, 1905. 125 Wis. 363, 103 N. W. 1113.)

Action by A. M. Murphy and another against the Sagola Lumber Company. From a judgment for plaintiffs, defendant appeals.

This is an action for the breach of a contract for the sale and delivery of a quantity of lumber. The plaintiffs are box manufacturers doing business at Green Bay, and the defendant is a corporation manufacturing lumber at Sagola, Mich. On the 4th of September, 1902, the parties entered into the following written contract:

"Green Bay, Wisconsin, September 4, 1902. Sagola Lumber Company, Sagola, Mich.—Gentlemen: We agree to pay to the Sagola Lumber Company, \$10.00 per M for one million feet of No. 4 Boards, F. O. B. Sagola, same grade and thickness as we have been getting in the past, to be no inferior in any way, and to be shipped as ordered when in shipping condition. We to advance the Sagola Lumber Company, \$5,000.00 to hold said lumber until we are ready to have same forwarded to us. It is also understood that three-quarters of this lumber is dry, or will be at the time it is wanted. The above purchase is to hold good with the understanding we are able to get a rate of 7½c. or stop-over rate that will not exceed 7½c. Murphy Box Company, E. N. Murphy, Mgr.

"We accept the above. Sagola Lumber Company. John O'Callaghan, President." 7

WINSLOW, J. The trial court held that the defendant breached the contract by refusing to forward lumber until the plaintiffs forwarded the last half of the consideration. Were there no other facts bearing upon the refusal to forward the lumber, we should have no difficulty in agreeing with the conclusion, but there are other undisputed facts which seem to us of paramount importance, and which demonstrate that the plaintiffs first breached the contract.

The contract was simple and easily understood. It provided for the purchase by the plaintiffs and the delivery by the defendant of 1,000,000 feet of lumber in parcels as ordered. The lumber was to be put "free on board" cars by defendant at Sagola. This was plaintiff's shipment and delivery by the defendant. When this was done, the title passed to the plaintiffs, and the lumber was at their risk, if it corresponded in quality with the provisions of the contract, and there is no claim that it did not. The amount of lumber to be paid for

⁶ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 92, 93.

⁷ The statement of facts is abridged.

was necessarily the amount put upon the cars at Sagola (provided it conformed with the contract), not the amount taken off the cars at Green Bay. Hence, under the terms and necessary implications of the contract, while the plaintiffs might tally the lumber at Green Bay on its arrival, and this tally would be some proof of the amount loaded on the cars at Sagola, they had no right to say that they would only pay for the amount received at Green Bay. If such was the definite position taken by them during the progress of shipments, it was a breach of the contract, for the contract was to pay for the amount put onto the cars at Sagola.

We think that the evidence very clearly shows that such was their position and claim. When the shipment of November 18th was received, they at once sent back a statement showing that it was 480 feet short, and deducting the shortage from the defendant's credit. The defendant wrote, requesting the plaintiffs to send a man to Sagola to tally out a lot with defendant's man, if there could be no agreement on the tally. To this letter plaintiffs made no reply, but on January 23d, following, sent to defendant a voucher for the amount then shipped in excess of the first half million feet, deducting the alleged shortage, and required a receipt in full of the account before it would be paid. This seems a very clear indication that the plaintiffs claimed that delivery was to be made at Green Bay, and that they would only pay for the amount actually received at that point.

That this was their position is further evidenced by plaintiffs' letter of January 20th, in which they say they will pay as cars are received and unloaded; also by the testimony of one of the plaintiffs, who said, "We refused to pay for any of the lumber until it was received by us in Green Bay." Of course, the plaintiffs had a right to inspect the lumber received at Green Bay, and reject the same if not in accordance with the contract. They also had the right to tally it, and such tally would be some evidence as to the amount actually delivered by loading on the cars at Sagola. But they had no right to insist that they would only pay for the amount received at Green Bay, regardless of the amount loaded on cars at Sagola. This latter position was clearly the position which they took. When this position was definitely taken by the plaintiffs, late in January, 1903, shipments were suspended for a time; but it is evident that the plaintiffs did not regard it as a final suspension, for on the 18th of February they requested the defendant to ship the balance of the lumber.

In reply to this the defendant again suggested that, if there were to be differences in the tally, it would be better to have the tally corrected at Sagola. The plaintiffs rejected this suggestion as unnecessary, and the defendant on February 21, 1903, declined to ship unless plaintiffs agreed definitely to accept inspection and tally at Sagola as final, or advance \$5,000, when they would proceed to ship all. The defendant had already submitted to the slight cut which plaintiffs made on the November shipment, by accepting the money sent in

January in full, but we do not regard this act as foreclosing it from insisting on the proper construction of the contract as to future shipments. The ground had been taken by plaintiffs that the lumber was to be delivered at Green Bay, and that only the lumber so delivered was to be paid for; and the defendant, by the letters last quoted, substantially took the ground, which we believe to be the proper one, that under the terms of the contract the lumber was delivered when loaded on cars at Sagola, and must be paid for if of the quality required.

Viewed in the light of all the circumstances, the plaintiffs' letters can only be construed as a demand that the lumber be delivered at Green Bay, and that only lumber so delivered would be paid for, when the contract provided for its delivery at Sagola. This was an announcement that they declined to carry out the contract according to its terms, and the defendant thereupon had the right to refuse to further execute the contract on its part. Nor were the rights of the parties affected by the offer of the defendant to deliver at Green Bay on condition that advance payment be made for the balance of the lumber. This amounted simply to an offer to vary the terms of the contract, which was not accepted by the plaintiffs. The conclusion reached upon this question renders unnecessary any consideration of the custom found by the jury, or of any of the other questions discussed by counsel.

The defendants were entitled to judgment upon the evidence and the verdict, and, the proper motion for judgment having been made in the trial court, there is no necessity for further trial. Judgment reversed and action remanded, with directions to enter judgment for the defendant dismissing the complaint.

VI. Acceptance ⁸

BAGBY v. WALKER.

(Court of Appeals of Maryland, 1893. 78 Md. 239, 27 Atl. 1033.)

See ante, p. 44, for a report of the case.

⁸ For discussion of principles, see Tiffany, Sales (2d Ed.) § 94.

VII. Excuses for Nonperformance of Conditions^o

1. RENUNCIATION OF CONTRACT

ROEHM v. HORST.

(Supreme Court of the United States, 1900. 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.)

This was an action for breach of four certain contracts, brought by Paul R. G. Horst and others against John Roehm in the circuit court of the United States for the eastern district of Pennsylvania, in January, 1897, and was tried under a stipulation, waiving a jury, before Dallas, circuit judge, who made a special finding of facts, and, on the facts so found, gave judgment for plaintiffs. 84 Fed. Rep. 565. The case was carried by defendant to the circuit court of appeals for the third circuit, and the judgment of the circuit court was affirmed. 62 U. S. App. 520, 91 Fed. Rep. 345, 33 C. C. A. 550. Thereupon Roehm applied to this court for a writ of certiorari, which was granted, and the cause subsequently heard here.

The opinion of the circuit court of appeals stated the case thus:

"In August, 1893, Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of 1,000 bales of prime Pacific coast hops, to be delivered at various dates in the future, at an uniform price of 22 cents per pound. Of the whole quantity 600 bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered 400 bales. These were deliverable at the rate of 20 bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation, and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date and are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made.

"In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's

^o For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 97-99.

interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract canceled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm, as follows:

"Dear Sir: Will you please write us whether you wish us to ship the hops under your contract direct to your city? The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"Very truly,

Horst Brothers.'

"To this letter Roehm replied, under date of September 14, 1896:

"Dear Sirs: In response to your letters dated 3d and 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"Very truly,

John Roehm.'

"On October 9, 1896, Horst Brothers advised Roehm of the shipment of 20 bales of hops for the October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"Gentlemen: Yours of October 9, inclosing bill of lading and bill of particulars per 20 bales of hops forwarded me under the terms of contract of August 25, 1893, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"Very truly yours,

John Roehm.'

"No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this action was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs."

Mr. Chief Justice FULLER delivered the opinion of the court:¹⁰

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for 100 bales each, covering the furnishings of 1,000 bales of hops during a period of five years, of

¹⁰ The statement of facts is rewritten and part of the opinion is omitted.

which 600 bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for 1,000 bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897," set them out in extenso, and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In *Hochster v. De la Tour*, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June 1st, on certain

terms. On the 11th of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May 22d plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed: "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court (Campbell, C. J., Coleridge, Erle, and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said:

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were

precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852; according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case." * * *

In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, Lord Esher, Master of the Rolls, puts the principle thus: "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472): "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a

breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

In *Smoot's Case*, 15 Wall. 36, 48, sub nom. *United States v. Smoot*, 21 L. Ed. 107, 110, Mr. Justice Miller observed: "In the case of *Phillipotts v. Evans*, 5 Mees. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: 'I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept.' And though some of the judges in the subsequent case of *Hochster v. De la Tour*, 2 El. & Bl. 678, disapprove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff." * * *

In *Dingley v. Oler*, 117 U. S. 490, 29 L. Ed. 984, 6 Sup. Ct. 850, it was held that the case did not come within the rule laid down in *Hochster v. De la Tour*, but within *Avery v. Bowden* and *Johnstone v. Milling*, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

So in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. Ed. 920, 923, 7 Sup. Ct. 882, involving a contract for the delivery of iron ore, the court said: "The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such."

In *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. 876, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about." * * *

In *Hancock v. New York L. Ins. Co.* Fed. Cas. No. 6,011, *Hochster v. De la Tour* was followed by Bond, J., in the circuit court for the eastern district of Virginia; and in *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708, *Drummond, J.*, fully approved of the principles decided in that case, and remarked: "It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards, or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages." * * *

The great weight of authority in the state courts is to the same effect. * * *

The rule is disapproved in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, and in *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. 938, on elaborate consideration. The opinion of Judge Wells in *Daniels v. Newton* is generally regarded as containing all that could be said in opposition to the decision of *Hochster v. De la Tour*, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In *Nichols v. Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. 566, Mr. Justice Peckham, then a member of the court of appeals of New York, thus expresses the distinction: "It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further de-

liveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of *Daniels v. Newton* was rested is that until the time for performance arrives neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in *Daniels v. Newton*, though it is not there in terms decided "that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." *Parker v. Russell*, 133 Mass. 74.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations

up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance? * * *

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster v. De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day. * * * Affirmed.¹¹

2. INSOLVENCY OF BUYER

DIEM v. KOBLITZ.

(Supreme Court of Ohio, 1892. 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.)

See post, p. 254, for a report of the case.

¹¹ See discussion of the question in 14 Harvard Law Review, 421.

RIGHT OF UNPAID SELLER AGAINST THE GOODS

I. Seller's Lien¹

McELWEE v. METROPOLITAN LUMBER CO.

(Circuit Court of Appeals, of United States, Sixth Circuit, 1895. 69 Fed. 302, 16 C. C. A. 232.)

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

Action of replevin brought by McElwee & Carney against the Metropolitan Lumber Company to recover possession of certain lumber sold by the defendant to Barker & Co. and claimed by the plaintiff as purchaser from Barker & Co. There was judgment for defendants, and plaintiffs bring error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge.² Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note to the vendor for the price, payable 90 days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract. In the absence of a contrary intention, clearly expressed by other parts of the contract, the right of property and of possession would vest in the buyer upon the execution of his promissory note payable to the seller. The provision for a final inspection at Escanaba after the delivery had begun was merely for the correction of errors before final settlement, and does not operate to defeat the presumption that title passed when the lumber was first inspected and accepted and conditional payment made. * * *

The passage of title does not militate against the existence of a vendor's lien. Such a lien arises upon the vesting of the title in the vendee, and is a mere right of the vendor to retain possession until the price is paid. If the title remains with the vendor, there is no lien; and this was explicitly stated to the jury, who distinctly found in their general verdict that the appellee had a vendor's lien. If such a lien existed when appellants replevied the lumber involved, it arose

¹ For discussion of principles, see Tiffany, *Sales* (2d Ed.) §§ 101-105.

² The statement of facts is rewritten and part of the opinion is omitted.

in consequence of facts occurring after the vendee gave his original notes. The agreement to give credit for 90 days after each installment of lumber was placed in a deliverable condition, and had been inspected and estimated, was wholly inconsistent with any right of the vendor to retain possession until the price was paid. The duty of immediate delivery, credit having been given was wholly inconsistent with a right to hold as security for the purchase price. * * *

Thus, after the execution to the vendor of the promissory notes of the vendee, the title or right of property and the right of possession to the lumber embraced within each monthly settlement were vested in Barker & Co. The actual, manual possession was with the Metropolitan Lumber Company, which was under obligation to deliver to the buyer as delivery should be required. Delivery could not be refused unless one of two things should occur before the actual possession was surrendered, namely, insolvency of the buyer or non-payment of the price when the credit expired. In case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien, which had been waived by a sale on a credit, would revive, and the vendor might lawfully retain his possession until the price was paid. Even if goods have been delivered to a carrier consigned to the vendee, and insolvency occurs before they reach the actual possession of the buyer, the vendor may exercise the right of stoppage in transitu to recover his possession, and thereby revive his lien. The right of stoppage in transitu is but an equitable extension or enlargement of the vendor's lien, and is not an independent or distinct right. 2 Benj. Sales (Corb. Ed.) §§ 1229-1245; *Loeb v. Peters*, 63 Ala. 249, 35 Am. Rep. 17; *Babcock v. Bonnell*, 80 N. Y. 244.

In the very well considered case of *White v. Welsh*, 38 Pa. 420, it was said by the court that: "Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage in transitu on account of the insolvency of the vendee, because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right to stop in transitu, a fortiori he has a right of retainer before any transit has commenced." "The rule is," said the court, "that so long as the vendor has the actual possession of the goods, or as long as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances."

Unless, therefore, the actual possession had been surrendered before the alleged change in the contract, to be hereafter considered, the vendor's lien would revive, in case insolvency occurred before delivery or the period of credit expired and the price was unpaid. The effect upon the vendor's right of the expiration of the period of credit while the actual possession is with the vendor is thus stated: "When goods have been sold on credit, and the purchaser permits them to

remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent." *Benj. Sales* (Corb. Ed.) § 1227.

This revesting of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. *Benj. Sales* (Corb. Ed.) §§ 1130-1185, and note 4; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 El. & El. 680; *Grice v. Richardson*, L. R. 3 App. Cas. 319; *White v. Welsh*, 38 Pa. 420; *Wanamaker v. Yerkes*, 70 Pa. 443; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; *Townley v. Crump*, 4 Adol. & E. 58. The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor.

The right of retention is not a right of rescission, and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in *Arnold v. Delano*, cited above, it seems to have been so regarded. If, after the revival of the vendor's lien by expiration of the credit, the seller extended further credit by taking renewal notes, payable at a future date, the revived lien would be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes. This state of things seems to have been contemplated by the parties; for, by one of the clauses of the original contract, a provision was made for renewals or extensions for such time as the lumber in the actual possession of the vendor when an extension was granted should "remain in the possession" of the lumber company, "not exceeding ninety days." The reasonable construction to be placed upon this provision is that the revived lien, resulting from the expiration of the original credit, should not be waived by renewal of purchase notes and an extension of credit. Before such extension, the buyer undoubtedly had the right of property and right of possession. After such renewals, all right of possession till the renewal notes were paid was lost. Independently of the agreement that extended credit should not waive the lien which had been revived by expiration of original credit, the insolvency which occurred during the running of the renewal notes would operate to revive the suspended lien, and, between vendor and vendee, or a subvendee standing on no higher ground than the vendee, the defendant in error had a right to hold the possession till the renewal notes were paid. The authorities already cited fully sustain this position.

Aside from all questions arising on the alleged modification of November 14, 1892, and all questions of estoppel, the rights of the defendant in error, in the actual possession of lumber which had not

been paid for, would not be affected by a sale to a third person. Such a subvendee would buy subject to the right of the vendor to hold possession as security for renewal notes; and, without regard to this special agreement, a subvendee would take subject to the possibility that before possession was obtained the lien might be revived by insolvency of the vendee or expiration of the stipulated credit. These considerations lead us to the conclusion that the rights of the plaintiffs in error, as subvendees, must, as the learned judge who presided at nisi prius instructed the jury, depend either upon questions of estoppel or upon the legal effect of the modification in the contract as defeating any right of lien in the vendor. * * *

This brings us to the legal effect of the alleged modifications of November 14, 1892, upon the rights of the parties; for, unless that modification materially changed the agreement, the renewals allowed in February following would continue a vendor's lien for the security of the renewal notes. Concerning this modification, the evidence tended to show that the mill of defendant in error closed down about the 11th or 12th of November, 1892. All the lumber theretofore cut, except such as was sawed after October 31st, had been inspected and settled for by the notes of the vendee. The lumber sawed between October 31st and the closing of the mill was inspected and estimated under the contract, and was in value something over \$9,000. The purchaser was not required, under the contract, to give notes for any lumber until the end of the month. Defendant in error wished, however, to settle up this matter at once, and therefore requested that Barker & Co. would give their notes for this remnant without waiting, as they had a right to do, until December 1st. Barker & Co. were at first unwilling, and the contention of the plaintiffs in error is that Barker & Co. did execute notes for the November cut, upon certain concessions being made. * * *

There is no evidence in this record which would justify a finding that there was an agreement that, after the modifications of November 14th, the vendors should no longer remain in possession as vendors, but should thereafter hold as agent or bailee for Barker & Co. Upon the contrary, the construction placed upon the agreement, after the alleged modifications, by both parties, was wholly inconsistent with any change in the character in which the vendor remained in the actual possession. The claim of Barker & Co. for an extension of credit was made upon the clause providing for renewals while the vendors remained in possession, and the whole correspondence was based upon the theory that the lumber would stand as a security for the renewal notes. On the evidence before the jury, it was not error to assume, as the trial judge did, that at the occurrence of the vendee's insolvency, there had been no delivery to the vendee, either actual or constructive. Neither do we think that it would follow, if there was such evidence, that a mere agreement, express or implied, by an unpaid vendor, to hold possession as bailee or agent for the

vendee, would operate as such a delivery to the vendee as to prevent the revivor of the vendor's lien if the vendee should fail before the actual possession was lost. It is to be borne in mind that this right of the vendor springs out of the relation of the parties and the natural equity that the vendor shall not be compelled to complete a contract by delivery when the vendee has not paid the price, or by insolvency becomes unable to carry out his side of the agreement. * * *

The conclusion we reach upon the foregoing questions may be summarized thus:

1. That the title and right of possession passed to Barker & Co. upon execution of their promissory notes as each month's product of finished lumber was inspected and received.

2. That during the running of the original notes no lien existed, and during the credit the vendees had a right to demand and take actual possession or make subsales to third persons.

3. That the lien of the vendor would revive upon expiration of the stipulated credit, without regard to the solvency of the vendee, or upon the insolvency of the vendee before or after maturity of purchase notes, and regardless as to whether such notes were outstanding or in the hands of the vendor.

4. That the renewal of matured purchase-money notes and the extension of a further credit would operate as a waiver of the lien which had revived upon the expiration of the original credit, unless there was an agreement to the contrary.

5. That the clause providing for renewal notes provided that this extended credit should not operate to waive the revived lien, by providing that the lumber should remain in the possession of the vendors till the renewal notes were paid.

6. That there was no evidence that the contract was subsequently modified so that the character in which the vendor thereafter held possession should be as bailee for the vendee, and not as vendor.

7. That, were it otherwise, such an agreement would not be such a delivery to the vendee, or loss of possession by the vendor, as would prevent the assertion of a vendor's lien upon expiration of the first or second stipulated credit, or upon the insolvency of the vendee before surrender of the actual possession. A fortiori, an agreement that the vendor should renew the vendee's notes and hold possession till payment of the renewed notes would be unaffected by the alleged agreement to hold as bailee for the vendee. The one agreement would be inconsistent with the other during the running of the extended credit, and, between vendor and vendee, the agreement under which notes were renewed would supersede the agreement to hold as bailee.

Entertaining these views, it is clear that, if the defendant in error is debarred from asserting a vendor's lien upon the insolvency of the vendee, it must be because the plaintiffs in error have acquired rights as subpurchasers which the vendor is estopped to deny or contravene

by the assertion of a lien. What are these rights, and what is their origin? As mere subpurchasers of lumber in the actual possession of the vendor, they only acquire the right and interest of the vendee. If, at the time they bought, the vendor had no lien, no right of retention, then they would acquire the right to demand delivery. But the right of a vendee who has bought on a credit is not an absolute right to demand delivery. The right is dependent upon the preservation of his credit, and, if he becomes insolvent before he obtains actual possession, the lien of the vendor revives, and the insolvent vendee must pay the purchase price before he can deprive the vendor of the goods remaining in his possession. So, if the vendor, for any reason, remain in the actual possession until the period of credit has expired, his lien revives.

Now, a subvendee buys only this defeasible right of the vendee; and, if he does not obtain the actual possession or obtain from the vendor an actual attornment to him, as in *Hurry v. Mangles*, cited heretofore, and the credit given the vendee expires while the vendor holds the actual possession, or the vendee becomes insolvent, he cannot, in the absence of some estoppel, deprive the unpaid vendor of his actual possession. The rights of subvendees have most often been under consideration in cases involving the doctrine of stoppage in transitu. But the principle is the same where transit has not begun. It was well said in *White v. Welsh*, 38 Pa. 420, that, "if a vendor has a right of stoppage in transitu, a fortiori he has a right of retainer before any transit has begun." Now the right of stoppage in transitu, special legislation out of the way, can only be defeated by the transfer of a bill of lading to an indorsee who bona fide gave value for it. *Benj. Sales* (Corb. Ed.) § 1285; *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. (Ed. 1879) 753. It will not be defeated by a mere assignment while in transit, or by an attachment by creditors of vendee. *Benj. Sales* (Corb. Ed.) § 1242; *Mississippi Mills v. Union & Planters' Bank*, 9 Lea (Tenn.) 318; *White v. Mitchell*, 38 Mich. 390; *Harris v. Pratt*, 17 N. Y. 249; *Umber Co. v. O'Brien*, 123 Mass. 12-14; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63; *Stanton v. Eager*, 16 Pick. (Mass.) 476; *Wood v. Yeatman*, 15 B. Mon. (Ky) 273; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17. No subsale during transit will defeat the right, unless the bill of lading be transferred. In the late case of *Kemp v. Falk*, L. R. 7 App. Cas. 573-582, it was said by Lord Blackburn that "no sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu." * * *

The best that can be said, favorable to plaintiffs in error, is that on the 5th of June, 1893, they for the first time obtained the title and right of *Barker & Co.* to the specified lumber involved in this controversy. Before the title to any part of this lumber vested, *Barker & Co.* had failed. Thereupon, the vendor's lien reattached, even assuming that it had been suspended by reason of the extended credit,

and had not been saved as an effect of the stipulation concerning renewals. * * *

If we are right in these conclusions, it follows that defendant in error is entitled to assert its vendor's lien. * * * Affirmed.

CRUMMEY v. RAUDENBUSH.

(Supreme Court of Minnesota, 1893. 55 Minn. 426, 56 N. W. 113.)

Action by George B. Crummev against S. W. Raudenbush for breach of contract of sale. Judgment was ordered for defendant, and plaintiff appeals.

MITCHELL, J.³ Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground. Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good. If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property.

Courts have differed as to the name to be given to this right, but they all recognize its existence. Like the analogous right of stoppage in transitu, it grows out of the vendor's original ownership, and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt. The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser

³ Part of the opinion is omitted.

was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. Insolvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements. Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do. The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security. But at no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade.

On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to deliver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a specific lien, this is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal on a different and distinct ground from

that on which he claimed to retain the property at the time of the demand. An examination of the authorities on the subject, from the early case of *Boardman v. Sill*, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so.

But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary, from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it,—a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused. The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase money, for that was a matter which he could remedy by payment, but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it. * * * Affirmed.

II. Stoppage in Transitu ⁴

1. AGAINST WHOM RIGHT MAY BE EXERCISED

KINGMAN v. DENISON.

(Supreme Court of Michigan, 1891. 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711.)

Replevin by Kingman & Co. against William C. Denison and the McCormick Harvesting Machine Company. There was a judgment in defendants' favor, and plaintiffs bring error.

LONG, J.⁵ On July 8, 1889, defendant Denison wrote the plaintiffs at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiffs received the letter next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiffs taking shipping bill from the railroad company there, and on same day sent it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17th, and on the 18th they turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made. It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store, and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10th, 11th, and 12th he gave mortgages on the same property to the bank and several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as their agent. The McCormick mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any and all the above-described property." On September 7th plaintiffs, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiffs wrote him for prompt remittance,

⁴ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 106-109½.

⁵ Part of the opinion is omitted.

which was not made. On September 19, 1889, plaintiffs brought replevin against the defendants for the twine, finding about one-half of it; the balance having been sold out of the store by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiff for \$351.91, the value of the twine taken, and costs. Plaintiffs bring error.

The plaintiffs asked the court to instruct the jury that plaintiffs were entitled to a verdict; and in the ninth request asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him." And in the tenth request it was asked that the jury be instructed that the McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a bona fide purchase. The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced—First, because they were ordered by Mr. Denison at a time when he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts in this case as shown by the evidence, has no application whatever; there is no such right existing." This part of the charge relating to the right of stoppage in transit is assigned as error.

The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case. The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. *Gibson v. Carruthers*, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vendor and vendee in process, and for the purpose of delivery, and this right may be exercised whether the insolvency exists at the time of

the sale or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Reynolds v. Railway Co.*, 43 N. H. 580; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *Benedict v. Scaettle*, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. *Harris v. Pratt*, 17 N. Y. 249.

In the present case it appears that the goods arrived in Grand Rapids July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and were in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed that by the terms of their mortgage they were entitled to hold it. The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed that they passed to them under the terms of their mortgage. They, however, stood in no better position than Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. They do not stand in the position of bona fide purchasers of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison. These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendors' rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. *Underhill v. Booming Co.*, 40 Mich. 660; *Lentz v. Railway Co.*, 53 Mich. 444, 19 N. W. 138; *White v. Mitchell*, 38 Mich. 390; *James v. Griffin*, 2 Mees. & W. 623.

In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them. The judgment of the court below must be reversed, with costs, and new trial ordered. The other justices concurred.

2. TERMINATION OF TRANSIT

SYMNS v. SCHOTTEN.

(Supreme Court of Kansas, 1886. 35 Kan. 310, 10 Pac. 828.)

Action by A. B. Symns & Co. against the Emporia Mercantile Association, for goods sold and delivered. Plaintiff attached certain goods in the possession of the Atchison, Topeka & Santa Fé Railroad Company consigned to defendant. Wm. Schotten & Co. intervened, claiming the goods as sellers to the defendant. There was judgment in favor of the interveners, and plaintiff brings error.^a

JOHNSTON, J. The only question to be decided in this case is whether Wm. Schotten & Co., who interpleaded in the action, had a right, under the facts, to reclaim the goods which they had sold to the Emporia Mercantile Association. It is agreed that the goods were sold on credit, and that after the sale, and before their arrival at the point of destination, the consignee became insolvent. The right of the vendors to repossess themselves of the goods at any time while they were on the road, and prior to their arrival at Emporia, is conceded. But it is claimed that because the goods had reached the point to which they were shipped, and had been unloaded from the cars, and placed in the warehouse of the railroad company, the transitus was at an end, and the vendors' right of stoppage was extinguished. The right of stoppage in transitu is not so limited a one as the plaintiff would make it. It is one which the law favors, and is said to be founded upon the just principle that one man's property shall not be applied in payment of another man's debts, and the courts have been inclined to encourage, rather than to restrict, the exercise of the right. The general rule is that the vendor may resume possession of the goods at any time before they actually reach the possession of the vendee. This right continues in the vendor, not only while the goods are being carried to the place of consignment, but may be exercised at any time until the delivery to the vendee or his agent has been completed. The unloading of the goods, and the placing of them in the warehouse of the railroad company, does not necessarily terminate the transitus, nor put an end to the right of

^a The statement of facts is rewritten.

stoppage; so long as they remain in the hands of the carrier or middle-men as such, the right does not cease.

There may be cases where the possession of the carrier or warehouseman, after the final destination is reached, will, owing to the agreement of the parties, or the special circumstances of the case, be regarded as the possession of the vendee, and so put an end to the vendor's right of stoppage. But where goods are consigned and shipped in the ordinary way, and the railroad company which brings them to the point of delivery, in performance of its duty as carrier, unloads and places the goods in its warehouse awaiting the payment of freight charges before delivery to the vendee, the presumption will be that the goods are still in transit, and that the right of stoppage yet remains in the vendor. In an Ohio case quite analogous to the one at bar, certain goods that had been consigned and shipped in the usual way were transferred by the railroad company to its warehouse at the station to which the goods were consigned, and near to which the vendee resided and did business, there to await the payment by him of the charges thereon as a condition precedent to their removal and delivery at his business house; and it was held that the transfer did not, ipso facto, constitute a delivery of possession to the vendee, but was to be regarded as a reasonable exercise of the duty by the carrier in the course of their transit, and as connected with the original employment of the company as agent of the vendor to transport and deliver, and therefore did not preclude the vendor's right of stoppage in transitu. It was recognized that in some instances the carrier or middle-man might become the agent of the vendee, and hold possession for the vendee, but it was said that such "agency will not be implied from the carrier's original employment, and can arise only by showing affirmatively some arrangement or understanding to that effect other than the general words of an ordinary consignment." *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. Rep. 63. There is no conflicting authority upon the question presented here, and no necessity for a review of the decided cases. Among many others which might be cited in support of the views expressed, we refer to the following: *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *O'Neil v. Garrett*, 6 Iowa, 480; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Covell v. Hitchcock*, 23 Wend. 611; *Harris v. Pratt*, 17 N. Y. 249; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Inslee v. Lane*, 57 N. H. 454; *Hoover v. Tibbits*, 13 Wis. 79; *Atkins v. Colby*, 20 N. H. 155; *Blackman v. Pierce*, 23 Cal. 508.

The record of this case discloses nothing from which we might infer that the carrier was the agent of the vendee. The goods were sold and consigned in the ordinary course of business between merchants, and when they arrived at Emporia they were taken out of the cars by the railroad company, and placed in its warehouse, and there held, in its character as carrier, to await the payment of charges

and a delivery to the consignee. The railroad company had not delivered the goods to the vendee, and in that respect its duty as carrier was incomplete. The freight was never paid, nor have the goods ever reached the possession of the vendee. The transitus, therefore, had not terminated, and the vendor's right of stoppage continued notwithstanding the seizure made under the attachment sued out by the plaintiff. The cause was rightly decided by the district court, and its judgment will be affirmed.

BECKER v. HALLGARTEN.

(Court of Appeals of New York, 1881. 86 N. Y. 167.)

Action for conversion. Wilhelm & Boemer, merchants in Berlin, Germany, sold to Boas & Stern, of the same place, certain goods on credit, giving them invoices of the same. The goods were shipped by direction of the purchasers to one Becker, the plaintiff, in Bremen. Boas & Stern borrowed 3,000 marks of one Goldstein, a banker in Berlin, on the security of the goods and the bills of lading, directing Becker to hold them subject to Goldstein's order, who directed Becker to ship them to defendants, Hallgarten & Co., of New York. Goldstein wrote defendants informing them of the shipment, and directed them to deliver the goods to one L. Stern, of New York, on payment by him of the Goldstein loan and expenses. Becker shipped the goods on August 4th to defendants, with bills of lading made out in his name as shipper, directing delivery of the goods to defendants. One bill of lading he mailed to defendants, directing delivery of the goods to L. Stern, as instructed by Goldstein. The duplicate bill of lading was forwarded to Boas & Stern, who sent it to Goldstein, who forwarded it to defendants, directing the same disposition of the goods by them. Becker cabled defendants on August 19th, on behalf of the vendors, stopping the goods in transit, and they agreed to hold them for plaintiff's account. The vendors afterwards assigned to plaintiff their claims against the purchasers for an accepted draft and balance of account. Under the laws of Germany, goods covered by bills of lading can be transferred only by written indorsement on the bills by the consignee. Those sent to defendant were not indorsed. Plaintiff tendered defendants their charges, and demanded the goods.

DANFORTH, J. Becker was at no time in the course of these transactions the agent or representative of the vendors. Until and including the shipment of the goods he was the agent of Boas & Stern, the vendees, or of Goldstein. He obeyed, as was proper, at the different stages of the affair, first one and then the other of these parties. If his special character ceased with the shipment, he neither entered the employ of the vendors, nor did he act under any instruction received from them. The finding therefore that in behalf of the vendors he stopped the goods is without evidence to support it.

Assuming, in the next place (for the purpose only of this discussion,) that by the assignment above set out he became vested with a vendor's right to stop goods while on their way to an insolvent purchaser, it is one which we think cannot be exercised in this case, for the reasons: First, that the transit was over before the goods left Germany. They were sent by the vendors to Becker, as the vendees' agent at Bremen. The shipment was preceded by and was in consequence of a request by B. & S. to the vendors "to send the boxes" to Becker "at our disposition." Therefore, on the 28th of July, informing Becker of the shipment to him, "at the request of and for account of Messrs. B. & S. of Berlin," they write, we have sent you part of the goods in question and "request you to carry out the further instruction of said parties concerning the same;" and in the next letter, communicating the shipment of the balance, they say, "and request you hereby to let Messrs. B. & S. have the further disposal thereof." It is obvious then that the impulse impressed upon the goods by the vendors carried them only to Bremen. Some other action was necessary on the part of the vendees before they moved again. They at that point transferred the goods to Goldstein, and made them, in the hands of Becker, subject to his order. The trial court finds not only a "taking of the goods by him as security," but that Boas & Stern "directed Becker to hold and ship the goods according to Goldstein's directions." This was done. The bills of lading were issued in favor of strangers to the vendees, and who represent a party having actual custody and the right of disposition. The shipment and the consignment by the vendors ended at Bremen. At that place new interests attached, in promotion of which the goods were sent forward. The only consignment by W. & B. was to Becker at Bremen.

It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself. *Valpy v. Gibson*, 4 C. B. 837; *Biggs v. Barry*, 2 Curt. 259; *Bolton v. L. & Y. R. W. Co.*, L. R., 1 C. P. 439. Also *Dixon v. Baldwin*, 5 East, 175; and this case is approved in *Covell v. Hitchcock*, 23 Wend. 611. In the case before us it is plain that they had reached the place for which they were intended, under the direction given by the vendors, and had come under the actual control of the vendees. *Dixon v. Baldwin*, *supra*, is commented upon in *Harris v. Pratt*, 17 N. Y. 249, and distinguished from the rule thought applicable to the facts of that case. There the suspense in transportation was temporary, and to be resumed at a future time in the direction already given by the vendors. But in the case before us not only is the actual fact like that in *Dixon v. Baldwin*, but if the detention at Bremen was originally intended only to give the vendees an opportunity to determine by which of several routes or at what time, as in *Harris v. Pratt*, the goods should go on, we have the additional

vital circumstances before adverted to of a complete possession and control by the vendees and its transfer to a third party, who also took the actual possession and control of the goods, and has since retained them. Neither *Harris v. Pratt* nor any of the other cases cited by the appellant go to the extent of upholding the vendor's lien in such a case.

Second. The transaction between Goldstein and the vendees was effectual to pass the property to him and so deprive the vendors of the right of stoppage if it otherwise existed. That right may always be defeated by indorsing and delivering a bill of lading of the goods to a bona fide indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist. This was held in *Lickbarrow v. Mason*, 2 T. R. 63, and has since been deemed established. It does not impair the force of this position that the money was in fact advanced before the delivery of the bill of lading. The goods were in the possession of Goldstein when he paid over the money. The bill of lading was promised and was part of the consideration on which the money was paid, but more than all he had the right, under the authority given to him by B. & S., to take the bill of lading in any form, and it was made out for his benefit. *City Bk. v. R. Co.*, 44 N. Y. 136. Nor is it material, unless made so by the German law (*infra*), that the bill of lading was not indorsed. It was not necessary that it should be. *Hallgarten & Co.* were Goldstein's agents, subject to his control, and in making the bill of lading in their names as consignees all was effected which the indorsement of a bill taken in the name of B. & S. would have accomplished. The cases cited by the respondent (*Meyerstein v. Barber*, L. R., 2 C. P. 45; *Short v. Simpson*, 1 id. 255), show that a bill so indorsed has the same effect, even if the ship containing the goods was at sea, as delivery of the goods themselves. Here there was a delivery of the goods to Goldstein, and the bill of lading followed the possession.

Third. The German law, as set out in evidence, has no application to the case in hand. It applies when the bill of lading is taken in the name of the vendee or of some person through whom the party claiming its benefit must make title. The observations already made show that in our opinion this is not the plaintiff's position. Nor are the defendants estopped from disputing the plaintiff's title. There is no finding of any fact upon which such doctrine can rest; no change of position by the plaintiff; a promise at most by the defendants without consideration, in violation of duty to their principals and in fraud of their rights. If it forms the foundation of any action, it cannot be one the effect of which is to deprive a third party of his property, or subject the defendant to a second action by the real owner of the goods. The right of stoppage, when it exists, depends upon equity, and that of the defendants, by virtue of their representative character, is superior in any view to the plaintiff's. If liable at all, it would be upon their assumpsit to keep the goods on his account. But what damages could the plaintiff show from the breach of an agreement to

keep for him, or subject to his order, goods to which another person was entitled, and whose claim was as to him exclusive?

Some other grounds are urged by the respondent on which he claims the judgment may be sustained. They have been examined, and are deemed untenable. The reasons for this conclusion need not be stated, since however decided, they would be insufficient to overcome the appellants' objections which have been already declared well taken. The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

III. Right of Resale ⁷

DIEM v. KOBLITZ.

(Supreme Court of Ohio, 1892. 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.)

Action by Koblitz Bros. against F. J. Diem. There was judgment for plaintiffs, and defendant brings error.

WILLIAMS, C. J.⁸ The contract of the parties, as shown by the pleadings, was one for the sale of goods on credit; the plaintiffs agreeing to give their commercial paper for the purchase price, payable at the times stipulated. As no time was specified in the contract for the delivery of the goods, the defendant's obligation was to deliver them when the plaintiffs gave their commercial paper, as they agreed to do, or within a reasonable time. The petition avers that the plaintiffs were at all times ready to perform their part of the contract, and that they requested performance by the defendant, which was by him refused. The answer denies these averments, and alleges that the plaintiffs became and were insolvent, and their commercial paper dishonored; and upon this information coming to the defendant, after part of the goods had been delivered to the carrier for shipment, he stopped them in transit, resumed possession, and afterwards resold them, with the other goods included in the contract, for the same price plaintiffs were to pay for them. The reply denies the insolvency of the plaintiffs, and avers that they accepted drafts drawn by defendant on them for the whole purchase price of the goods, payable in accordance with the contract. The view which the court below took of the case was that the resale of the goods, as alleged in the answer, was a breach of the contract by the defendant, which gave the plaintiffs, notwithstanding their insolvency, an immediate right of action against him for damages. Hence, proof of the insolvency of the plaintiffs was ex-

⁷ For discussion of principles, see Tiffany, Sales (2d Ed.) § 110.

⁸ The statement of facts is abridged and part of the opinion is omitted.

cluded as immaterial, and the case was submitted to the jury as involving no inquiry except the amount of the plaintiffs' damages.

We do not understand it to be claimed that the defendant, upon learning of the plaintiffs' insolvency, might not lawfully retake the goods while they were yet in the custody of the carrier, nor that he was bound to deliver any part of the goods so long as the insolvency of the plaintiffs continued. The claim is that the right of the vendor in such case is simply to retain possession of the property until the purchase price is paid, and therefore a resale by him before the expiration of the credit puts it out of his power to deliver to the first vendee, and so constitutes a breach of the contract with him, for which he may, though insolvent, maintain a special action for damages. Whether this claim is correct or not is the principal question in the case.

The right of stoppage in transitu is the right of the vendor to resume possession of the goods sold, while they are in transit to the vendee, who is insolvent or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if, before the stoppage in transitu, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary, apparent evidences of insolvency. Nor is the vendor's right abridged or in any way affected by the fact that he has received the vendee's bills of exchange or other negotiable securities for the whole price, even though they have been negotiated, and are still outstanding. It seems to be well settled that when the right of stoppage in transitu is properly exercised the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle, that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them or perform the contract on his part. To require the goods to be delivered to such vendee would simply be applying the property of one man to the payment of another man's debts.

The right of the unpaid vendor with respect to the goods is sometimes called a "lien;" and it is a lien, in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere common-law lien, which is only a naked right of possession. With the goods in his possession, the vendor has a special property in them, which is parcel of his original ownership. Whether the effect of the stoppage in transitu, or the retention of the goods by the vendor, on the discovery of the vendee's insolvency, is to rescind the contract, or not, has been the subject of much discussion; and some authors say the question is not yet definitely settled. But the prevailing opinion now is, we believe, that the contract is not necessarily rescinded, unless the parties by their

conduct so treat it, which conclusion is most favorable to the vendor, for whose protection the doctrine of stoppage in transitu was first established; for, if the exercise of the right operated to rescind the contract, the vendor would be deprived of the remedy which it is now generally conceded he has, in a proper case, upon a resale of the goods, to hold the vendee or the assignee of his estate for the loss sustained through his non-performance of the contract, or in consequence of a fall in the market price. And as the stoppage does not rescind the contract of sale, it follows that the vendee or his assignee may obtain the goods on payment of the price, or, if the vendee was able and ready to perform the contract on his part, he may recover damages for the failure of the seller to deliver the property according to its terms.

But can the vendee maintain such action if he is not able to perform? And does his insolvency at the time fixed for the delivery of the property amount to such inability? Or, where the sale is upon credit, does a resale of the property by the vendor before the expiration of the time of the credit give the insolvent vendee, notwithstanding his inability to pay for the goods, a right of action against the vendor for the difference between the contract price and their market value at the time of the resale? As an authority sustaining the right of the vendee to maintain such an action against his vendor, *Bloxam v. Sanders*, 4 Barn. & C. 941, is cited, where Bayley, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vested at once in him; but his right of possession is not absolute. It is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems perfectly clear. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, for his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and while they are in transitu, a fortiori is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act upon the right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which

right of property and right of possession are both requisite, unless they have both those rights."

Still the question remains, when is the resale wrongful? And what is necessary on the part of the vendee to enable him to maintain the action for the resale is not decided, nor does it appear to have been a question in the case. The action was trover, to the maintenance of which the right of possession was essential. In *Smith's Leading Cases*, (volume 1, pt. 11, p. 1199), in the note to *Lickbarrow v. Mason*, 2 Term R. 63, it is said: "Supposing the contract of sale not to be rescinded, it seems to follow that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired. After that period, indeed, the refusal of the vendee or his representatives to receive the goods and pay the price would probably be held to entitle the vendor to elect to rescind the contract." The only authority cited in support of the note above quoted is *Langfort v. Tiler*, Salk. 113, from an examination of which it will be seen that it does not meet the question. * * *

When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day involving an engagement on his part that he will remain and then be able to pay, which engagement is broken when he becomes insolvent and unable to pay; and hence the right of the vendor to then stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has given his notes or bills or other securities for the price, payable at the end of the time for which the credit is allowed. The vendor, in such case, incurs no liability by not delivering the property, unless the vendee pay or tender the contract price. But, in order to sue the vendee, he should offer to deliver according to the contract. Such is the scope of the rule laid down in *Mining Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424, where it is held: "The insolvency of the vendee in a contract for the sale and future delivery of personal property in installments, payment to be made in notes of the vendee as each installment is delivered, 'is sufficient to justify the vendor for refusing to continue the delivery, unless payment be made in cash;' but it does not absolve him from offering to deliver the property in performance of the contract, if he intends to hold the purchasing party to it. He cannot insist upon damages for non-performance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good." The rule must work both ways. The rights and obligations of the vendor and vendee are correlative. If the insolvency of the vendee is sufficient to justify the vendor in refusing to deliver the property unless payment be made in cash, it follows that the vendor incurs no liability by his refusal, and therefore no right of action accrues to the vendee, unless pay-

ment be made by him; and if the vendor cannot insist upon damages for the vendee's non-performance without showing an offer on his part, with the ability, to perform, so neither can the vendee, if he is without the ability to perform, recover from the vendor. * * *

But it is contended that, while the vendor may refuse to deliver the property to the insolvent vendee, he is obliged to keep it for the vendee until the time of the credit expires, and if he resell before that time the vendor may have his action for damages. When, by the contract, the property is to be delivered at a future day, and the vendor sells it to another before that time arrives, the vendee, being able to perform, may have an immediate action; for the vendor, by thus disabling himself from performing by delivery at the proper time, commits a breach of the contract, and the vendee need not wait until the time for the delivery arrives. But that rule has no application here. The obligation of the vendor, under a contract like that between the parties in this case, is to deliver the goods at the time stipulated in the agreement, which is at once, upon the receipt or tender of the purchaser's commercial paper, or within a reasonable time,—not at the time to which the credit is extended. The right of the vendee, is to receive the goods at the time the vendor contracts to deliver them, and he is not bound to receive them at any other time. The breach, therefore, on the part of the vendor, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time, and not upon a resale subsequently made; and the vendee's cause of action arises, if at all, upon the failure to deliver, and not on the resale.

In the case now before us the averments of the defendant's answer, which on the trial he was not permitted to prove, though he offered to do so, show that at the time the goods were to have been delivered, according to the contract of sale, the plaintiffs were insolvent and their paper dishonored, so that the condition upon which their right to the goods depended had not been performed by them, and they were without the necessary ability to perform the same. Upon what just principle can the seller, in such a case, be required to hold the goods until the expiration of the credit? It is true that at that time the vendee may again be solvent, and able to pay. There is no presumption or assurance that he will. If any presumption arises, it is rather that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the mean time, which in many instances must ensue if the seller is compelled to keep the goods shut up, and take the risks of the future solvency of the buyer. The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that

character until the termination of the credit. In the notes to *Lickbarrow v. Mason*, in *Smith's Leading Cases*, (volume 1, pt. 11, p. 1199,) it is said: "But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them until the time of credit has expired? In such a case it is submitted that courts of law, having originally adopted this doctrine of stoppage in transitu from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale."

It is insisted, however, that the right of sale in such cases constitutes an exception to the rule. In our opinion the reasons upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and, if not available for those purposes at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable to subject the vendor to the loss in the one case than in the other. The right of resale ought not, we think, be made to depend upon the degree or extent of the loss that must ensue if it be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice, but that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default. We see no good reason for holding that the rights of the seller are any the less where the sale is upon credit, and the property is retained by him on account of the buyer's insolvency, than they would be if the sale were for cash, and the vendee was unable to pay the price agreed upon. In either case the incapacity of the vendee to perform his part of the agreement—and insolvency is incapacity—warrants the vendor in withholding performance on his part.

We are therefore of opinion the trial court erred in excluding the evidence of the plaintiffs' insolvency, and in charging the jury as shown in the statement of the case, and also in refusing the instruction requested by the defendant therein contained. Counsel have argued a question relating to the charge of the court on the measure of damages; but, as no exception was taken to the charge on that subject, it will not be further noticed. For the errors mentioned above, the judgments below are reversed, and the cause remanded for further proceedings.

DUSTAN v. McANDREW.

(Commission of Appeals of New York, 1870. 11 N. Y. 72.)

See post, p. 260, for a report of the case.

IV. Right to Rescind ⁹

DUSTAN v. McANDREW.

(Commission of Appeals of New York, 1870. 44 N. Y. 72.)

Action for breach of contract. On August 24, 1860, J. S. & W. Brown, of the city of New York, executed an agreement with the plaintiff as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have sold this day to Mr. John F. Dustan, of this city, 100,000 pounds of first sort western or eastern hops as we may select; growth of 1860; deliverable in the city of New York, at our option, during the months of October or November, 1860, at seventeen cents per pound, subject to Mr. J. S. Brown's inspection, or other mutually satisfactory. Terms, cash on delivery. Mr. Dustan's name to be made satisfactory either by indorsement or by a deposit of \$2,500 by both parties. J. S. & W. Brown."

On September 7, the plaintiff sold this contract to the defendants, by an instrument as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold to McAndrew & Wann the contract of J. S. & W. Brown, dated 24th August, 1860, for 100,000 pounds first sort hops, western or eastern, growth of 1860; upon condition that the said McAndrew & Wann fulfill the conditions of said contract to the said J. S. & W. Brown, and pay to me, in addition, on delivery of the hops, ten and one-half cents per pound. John F. Dustan. New York, September 7, 1860."

On November 28, J. S. & W. Brown notified the plaintiff by letter, that they would deliver the hops pursuant to contract on the 30th of that month; and plaintiff immediately, on the same day, notified the defendants of that fact, inclosing to them the letter of J. S. & W. Brown; and on the same day the said J. S. & W. Brown wrote a similar letter to the defendants. These notices actually came to the hands of the defendants on the morning of the 30th.

Prior to November 30, John S. Brown had inspected the hops and put his brand upon them, and certified that they were such hops as the contract called for. On November 30, J. S. & W. Brown were ready and willing to deliver the hops, and the defendants were requested to take them, and they declined on the sole ground as they claimed, that they had not had an opportunity to examine them and inspect their quality, and because Messrs. Brown had refused to let an inspector whom they sent, inspect the hops.

⁹ For discussion of principles, see Tiffany, Sales (2d Ed.) § 111.

On December 24 the plaintiff took the hops from Messrs. Brown and paid for them, and on the same day wrote the following letter to defendants: "New York, December 24th, 1860. Messrs. McAndrew & Wann: Gentlemen.—The 100,000 pounds hops mentioned in contract of J. S. & W. Brown with me, of 24th August, 1860, and in contract of yourselves with me of 7th September, 1860, are now at the store No. 4 Bridge street, awaiting the fulfillment by you of the terms of your contract, and I hereby tender to you the said hops, and demand from you the payment of the sum of \$27,500, the amount of such contract price. Unless you comply with the terms of said contract, on or before the 26th day of December, instant, I will proceed to sell the same on your account and hold you for any deficiency. Your obedient servant, John F. Dustan."

Defendant still declined to take the hops, and then on December 26 plaintiff placed them in the hands of a hop broker, who sold them for twenty cents per pound.

The plaintiff also gave evidence that on November 30 and on December 26 twenty cents per pound was the fair market value of the hops; and the defendants gave evidence that on both of these days the market value was some cents higher. There was also evidence showing that hops had a downward tendency in market all through the month of December. It was shown that the hops in all respects answered the contract. Judgment for plaintiff.

EARL, C. The contract required that the hops should be inspected by J. S. Brown, or some other inspector satisfactory to both parties. In case J. S. Brown could not or should not inspect them for any reason, then they were to be inspected by some other person mutually satisfactory. Neither party had the right to demand any other inspector, unless Brown neglected or refused to inspect. It is doubtless unusual to insert a stipulation in contracts that the vendor shall inspect the goods sold. But where parties agree to this they must be bound by their contract, and it must be construed the same as if some other person had been chosen inspector.

It is claimed on the part of the respondent, and was held by the court below, that the inspection provided for was intended simply for the convenience of the vendors, to enable them to perform their contract, and that it merely furnished prima facie evidence that the hops answered the contract, and that the inspection was not conclusive upon the parties. I cannot assent to this. The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase-price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety

of contracts, was to prevent dispute and litigation at and after performance. But if the inspection was merely for the convenience of the vendors, then they could dispense with it, and compel the vendees to take the hops without any inspection whatever. And if it was merely *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated.

The inspection could be assailed for fraud, or bad faith in making it, and perhaps within the case of *McMahon v. New York & Erie R. Co.*, 20 N. Y. 463, because made without notice to the vendee. The inspection here was made without notice; but it is not necessary to determine whether this renders it invalid, as no such defense was intimated in the answer or upon the trial.

By the purchase of the contract the defendants were substituted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof however that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several storehouses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendor, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might perhaps have shown that notice was given by the vendors, or that it was waived.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors, and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the court erred in the rule of damages adopted in ordering the verdict.

The court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plain-

tiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase-price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price. 2 Pars. Cont. 484; Sedgw. Dam. 282; *Lewis v. Greider*, 49 Barb. 606; *Pollen v. Le Roy*, 30 N. Y. 549. In this case the plaintiff chose and the court applied the second rule above mentioned. In such case the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable, and we can find nothing in the case to authorize us to hold that it was unjustifiable.

We are therefore of the opinion that the court did not err as to the rule of damages. The judgment should therefore be affirmed, with costs.

ACTIONS FOR BREACH OF CONTRACT

1. Remedies of the Seller—Damages for Nonacceptance¹

UNEXCELLED FIREWORKS CO. v. POLITES.

(Supreme Court of Pennsylvania, 1890. 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788.)

CLARK, J. This is an action of assumpsit, brought July 20, 1888, to recover the price of a certain lot of fireworks and celebration goods, ordered by the defendant, George Polites, from the Unexcelled Fireworks Company, of New York, in February, 1888. The first order, which was for his store in Newcastle, was given through the plaintiff's agent, Alexander Morrison, and amounted to \$208.53; the second, sent directly to the plaintiff, was for the defendant's store in Washington, Pa., and amounted to \$123.83. These orders were in writing, and were signed by the defendant. They specified, not only the particular kind and quality of the articles ordered, but contained also a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the 10th day of July thereafter. Upon receipt of these orders the plaintiff transmitted by letter a formal acceptance of them. A contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On the 5th day of April, 1888, the defendant, by letter, informed the plaintiff that he did not want the goods, and notified the plaintiff not to ship them, as he could do better with another company. The plaintiffs replied that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement. The goods were shipped within the time agreed upon,—the first lot to Newcastle, and the second lot to Washington, according to contract; but on the arrival the defendant declined to receive them. The carrier notified the shipper that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession. The plaintiff thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiff alleges that it is a manufacturer and importer of such fireworks as are used in the 4th of July celebrations throughout the country; that it is not profitable to carry these goods over from one season to another, and that therefore the quantity manufactured and

¹ For discussion of principles, see Tiffany, Sales (2d Ed.) §§ 112-114.

imported depends upon the extent of the orders received; that the defendant's orders entered into its estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiff's agent, informed him, at the time he gave the first order, that the plaintiff had some, at least, of the articles in stock, and that he did not order any, either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case. It is plain that the notice given to the plaintiff by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiff thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiff itself made the carrier its agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered.

We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evidence given of the market value of the goods as compared with the price. It does not appear that the plaintiff had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market. While the manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part he is entitled to recover the contract price as his measure of damages, in the case of an executed contract for the sale of goods not specific the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery. Judgment affirmed.

II. Remedies of the Buyer—Damages for Nondelivery ²

BLUMENTHAL v. STAHLÉ.

(Supreme Court of Iowa, 1896. 98 Iowa, 722, 68 N. W. 447.)

Action at law to recover a balance alleged to be due for goods and merchandise sold by the plaintiffs to the defendants. The defendants answered the petition, and by way of counterclaim demanded judgment against the plaintiffs for failure to perform a contract previously made for the sale of certain laces. There was a trial by jury, and a verdict and judgment for the defendants. Plaintiffs appeal.

ROTHROCK, C. J.³ The plaintiffs are importers of laces and other fancy goods, and their place of business is in the city of New York. The defendants are jobbers in millinery goods, having their place of business in the city of Burlington, in this state. The plaintiffs carried on their business by sending their traveling salesmen out in search of orders for goods from jobbers. One of these salesmen appeared at the defendants' store in Burlington in September, 1892, and solicited an order for goods. After some negotiations, the defendants gave the salesman an order for about \$800 worth of laces, which the plaintiffs undertook to import from some other country, and deliver to the defendants from the 1st to the 15th day of January, 1893. The goods were not imported and delivered by that time. The order was mislaid by the plaintiffs or their salesmen, and when the time for delivery had about expired the defendants wrote letters of inquiry, and the letters were answered, and there was then no time to import the goods so as to fill the order within the time agreed upon. The defendants then purchased laces from other dealers, and later on they made a purchase of the plaintiffs of about \$500 worth of laces, as we understand it, upon a new order. When this order was filled, the defendants remitted \$300, and refused to pay the balance, and made a claim for damages for the failure of the plaintiffs to perform the contract made for the laces to be imported. The defendants carried on their business by sending out traveling salesmen to take orders for goods, and they told the salesman of the plaintiffs that they wanted to send out traveling men about the 15th day of January, and there is evidence in the case that the time named was about the proper time to put traveling men on the road to take orders for the next spring trade.

One item of damages claimed by the defendants was that, by reason of the failure of plaintiffs to perform their contract, the defend-

² For discussion of principles, see *Tiffany, Sales* (2d Ed.) § 115.

³ Part of the opinion is omitted.

ants' salesmen were idle for about two weeks before a supply of goods could be obtained by defendants from other dealers. It is said that this demand for damages is too remote; that to permit a recovery for the delay was a violation of the well-known rule of law that damages for the breach of a contract are limited to such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract. This is a brief statement of the doctrine. But it is, in substance, the rule, as has been many times announced in adjudged cases. It is not denied that Haynes, the traveling salesman of the plaintiffs, was advised of the time when the defendants desired to put their salesmen on the road. Surely, it was not necessary, to recover damages, that defendants should show that they told Haynes that, if they sent their salesmen out later, or had to wait for that time for the laces, their salesmen would be idle, and that other jobbers would be in advance of them in securing the spring trade. In determining the question of damages in such a case, the seller ought to be held to have in contemplation the ordinary and usual methods of the business of the purchasers, or of the trade with which he transacts business. * * *

It is contended that by the subsequent order made by the defendants they waived any claim for damages for failure to fill the order for goods to be imported, and that the second order estops them from claiming damages for failure to perform the first contract. It is true that when these goods were contracted for and delivered nothing was said or written about damages for failure to comply with the importing order. The defendants were silent on that subject. But they made no release of any claim they had for damages. * * * Affirmed.

JOHNSTON v. FAXON.

(Supreme Judicial Court of Massachusetts, 1899. 172 Mass. 466, 52 N. E. 539.)

Action by William C. Johnston against Edwin Faxon and others. Verdict was directed for plaintiff for one dollar damages, and he brings exceptions.

HOLMES, J. This is an action for breach of a contract to build for the plaintiff, a retail dealer, 300 bicycles of a certain kind, "to be delivered as said Johnston may direct, from January 1, 1895, to July 1, 1895." The defendants broke the contract, and the plaintiff was obliged to cancel most of the orders which he had received, amounting in all to more than 300. The plaintiff was to pay the defendants \$50 a bicycle. The retail price, as fixed by subsequent agreement between the plaintiff and defendants, was \$150. This, or near it, was the price on the orders. The auditor, and the judge of the superior court after him, ruled that the plaintiff could recover only nominal damages, al-

though, if the loss of the orders would not be too remote, his damage was found to be upwards of \$14,000. The plaintiff excepted.

This court has gone a good way in refusing to allow profits to be recovered for on the ground that they were too remote. *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020. But, of course, the anticipation of profit, although sometimes disguised under the name of value, constantly is taken into account. If we say that the rule of damages in a case like this is the difference between the contract price and the value of the machines if furnished, the question arises whether, supposing the plaintiff to have been unable to get the machines elsewhere in time for the season, which was over before July 1st, the value should not be determined by the orders and the agreement with the defendants, which would be allowing for the anticipation of profit under another name. *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718. The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that was the object of the agreement. Especially in view of the part they took in fixing the retail price, they must be taken to have expected that the wheels would be sold at an advance. The article was not one to be purchased generally in the market, and therefore they knew that the plaintiff's chance to make the difference between their price and his would depend upon their doing what they undertook.

It is true that the agreement as to the retail price was made in January, 1895, and that the orders came in from December, 1894, to June, 1895, while the contract was made in November, 1894. But we presume that the defendants would not care to argue that there was any unexpected rise in retail market values between November and January. Moreover, if the liability were made out in other respects, it might be held that the defendants, by their contract, adopted whatever might turn out to be the retail price at the time and place of delivery. *Shaw v. Nudd*, 8 Pick. 9; *Quarles v. George*, 23 Pick. 400; *Harvey v. Railroad Co.*, 124 Mass. 421, 425, 26 Am. Rep. 673; *Sedg. Dam.* (8th Ed.) §§ 737, 738.

The only difficulty in the way of the proposed measure of damages which impresses us is that, when the defendants made their contract, it was not certain, in a commercial sense, that the plaintiff could sell what he ordered. His bicycle seems to have been more or less of an experiment. But as remoteness—that is to say, whether, under given circumstances, upon an ascertained contract, certain damages are within the scope of the risk undertaken—is always a question of law (*Hobbs v. Railway*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. Div. 79, 89), and as the auditor found the amount of the plaintiff's damages, if they were not too remote, we are compelled to say that, as between the plaintiff's claim and nominal damages, the former comes nearer to doing justice than the latter, in view of the considerations which we have mentioned. The defendants, by their contract, took the

risk of damages to that extent, if it should turn out that the plaintiff could sell as it was contemplated and expected that he would. Sedg. Dam. (8th Ed.) §§ 197, 198; *Hammond v. Bussey*, 20 Q. B. Div. 79, 86, 94, 100.

It will be understood that the contracts made by the plaintiff are not recovered for as such. But the orders, covering as they did more than the number of bicycles to be built by the defendants, coupled with the above-mentioned agreement as to the retail price, are evidence of the value of the wheels. *France v. Gaudet*, L. R. 6 Q. B. 199, 204.

If, as we understand, the orders were contracts, conditional only upon being performed in time, it does not matter whether they were good or bad under the statute of frauds. They are equally instructive as to value either way, if they were mercantile agreements intended to be carried out.

Exceptions sustained.

III. Breach of Warranty—Rights after Acceptance ⁴

I. IN GENERAL

EYERS v. HADDEM.

(Circuit Court of United States, W. D. Wisconsin, 1895. 70 Fed. 648.)

BUNN, District Judge.⁵ This is an action brought by the plaintiffs, who are citizens of North Dakota, against the defendants, who are citizens of Wisconsin, upon a warranty in the sale of a stallion. The defendants are importers of blooded horses at Janesville, Wis., and on March 11, 1893, sold to the defendants an imported stallion, by a bill of sale containing the following printed warranty: "We hereby guaranty the above-named horse to be a reasonable foal getter, with proper care and handling. In case he should prove not to be so, we agree to replace him with another horse of same breed and price, upon delivery to us of the above-named horse at our stables without cost to us, if as sound and in as good condition as when purchased of us."

The case was tried before a jury at La Crosse in September, 1895, and a verdict rendered in favor of the plaintiffs for \$1,350. The price paid for the stallion was \$2,700. The plaintiffs' evidence was directed to show that the horse, instead of being a reasonable foal getter, was what is known among horsemen as a "ridgeling," and nearly worthless as a foal getter. The plaintiffs' evidence went to show that during the season of 1893, when the plaintiffs stood him

⁴ For discussion of principles, see *Tiffany, Sales* (2d Ed.) §§ 119-121.

⁵ Part of the opinion is omitted.

for service, he got only about 10 per cent. of mares served with foal, and that his value was not more than that of a common workhorse, or about \$150. After the evidence was in the defendants asked the court to direct a verdict in their favor, on the ground that the evidence showed that plaintiffs did not return the horse according to the conditions of the warranty, and give the defendants the opportunity to replace him with another horse. The court overruled the motion pro forma, reserving the question for further argument upon a motion for a new trial, in case there should be a verdict in favor of the plaintiffs. That motion has now been heard, and fully argued and considered, and the court is of opinion that it must be overruled.

The rule is laid down in 28 Am. & Eng. Enc. Law, 827, as follows: "In a sale of certain classes of articles, the contract of sale frequently specifies the buyer's remedy in case the warranty is not complied with. The buyer is not concluded by such a provision, however, but may waive the special remedy, and proceed as if the contract had been silent in that particular. The special remedy usually allowed in such contracts is the privilege of returning the article, if it proves not to be as warranted, and to receive back the price paid."

And it seems to be fully supported by the authorities. One of the leading and best-considered cases on the subject is that of *Manufacturing Co. v. Gardner*, 10 Cush. (Mass.) 88. In that case the court, by Metcalf, J., says: "When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded provision rescinds and vacates the contract of warranty. We are of opinion that in such case the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."

The same ruling was made by the supreme court of Connecticut in an opinion by Park, C. J., in *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339. In *Perrine v. Serrell*, 30 N. J. Law, 454, the action was on a warranty in the sale of a horse, with a provision that if the horse did not suit he might be returned, and the seller would take him back and send one that would suit. The court held that this latter provision was independent of the warranty, and that the purchaser was not obliged to return the horse, but could maintain his action upon the warranty. In *Love v. Ross*, recently decided (October, 1893) by the supreme court of Iowa, reported in 89 Iowa, 400, 56 N. W. 529, the contract was for the sale of a stallion, with a warranty that he was a reasonably sure foal getter under favorable circumstances, and in default of which the purchasers could return the stallion to the sellers in as good condition as he was then in, and the sellers would exchange him for another, giving or receiving the actual difference of value in the two animals. In my judgment the case is not distinguishable from the one at bar. It was held that the purchasers had the right to retain the horse and to recover damages for

the breach of the warranty, or to return him and receive another horse in exchange upon the terms stated. *Hefner v. Haynes*, by the same court, decided in 1894, reported in 89 Iowa, 616, 57 N. W. 421, holds to the same rule under a similar warranty in the sale of a stallion. The supreme court of Minnesota, in *Mandel v. Buttes*, 21 Minn. 391, and *Fitzpatrick v. D. M. Osborne & Co.*, 50 Minn. 261, 52 N. W. 861, has held the same doctrine, following *Manufacturing Co. v. Gardner*, *supra*. * * * The supreme court of Wisconsin has affirmed the same doctrine in *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. 636, and in *Park v. Richardson & Boynton Co.*, 81 Wis. 399, 51 N. W. 572. * * *

In the proper construction of the warranty in the case at bar, there are one or two other considerations which I think should have some weight. The warranty is in print, being part and parcel of a printed blank for the sale of horses by the defendants, furnished and in common use by them. The guaranty is absolute and complete in itself, closing with a full stop. The provision for a return of the horse, which is superadded, does not in terms make it obligatory upon the purchasers to return him. It only says that upon his delivery to the sellers without cost, if as sound and in as good condition as when purchased, the sellers will replace him with another horse. It is only by construction that any obligation can be put upon the purchasers to return the horse. It would have been very easy by the change of a few words, to have placed the obligation upon the purchasers, in express terms, that is now sought to be put upon them by construction. Under these circumstances, it would seem proper to apply the rule that is sometimes applied, that, when there is doubt about the proper construction, to construe the contract most strongly against the person furnishing the printed blank containing the provision in question.

It is evident that, if the construction contended for by the defendants be the true one, the remedy under the warranty, in the circumstances of this case, might amount to but very little. Under the provision that the horse must be as sound and in as good condition when returned as at the time of the sale, it is evident that the purchasers could refuse to receive him back if he lacked in any degree of being in as good condition as when sold. The sale was in March. The foal-getting qualities of the horse could not be tested until late in the season of that year. If in the meantime a ringbone or spavin or other defect should come upon the horse, or he should have any distemper or sickness common to horses, without any fault on the plaintiffs' part, and perhaps from causes existing before the sale, the vendors might refuse to receive the horse back, though the defect may have had no relation to or effect upon his value for the purposes for which he was sold, in which case the purchasers would have no benefit from the warranty.

There is a provision in writing filled into the blank which shows quite clearly that the vendors intended to have it in their power to take advantage of any slight defect or ailment whatsoever in the horse arising after the sale, though it should have no relation to his qualities as a foal getter. That provision is this, that: "In case this horse is returned on account of not being a reasonable foal getter, a lump on inside right fore leg, and below the knee, shall not be considered a blemish and reason for not taking him back, as a small injury appears there now."

If he did not prove to be a good foal getter, which could not be tested until one season had elapsed, and could not be returned on account of some small blemish not affecting materially his value, which rendered him in not so good a condition as at the time of the sale, the warranty would be of no appreciable value, if there were no remedy for a breach except to return the horse. Such a result, considering the language used, could hardly have been in the contemplation of the parties. The motion for a new trial is denied.

2. RESCISSION

CANHAM v. PLANO MFG. CO.

(Supreme Court of North Dakota, 1893. 3 N. D. 229, 55 N. W. 583.)

Action for breach of contract by John Canham against the Plano Manufacturing Company. Plaintiff had judgment, and defendant appeals.

CORLISS, J.⁶ The defendant sold and delivered to plaintiff a twine binder. For this, plaintiff gave his three promissory notes. He subsequently returned the machine, claiming that there was a breach of the warranty accompanying the sale, and, having paid two of these notes, he brings suit to recover the amount so paid, and also the amount due on the other note. If there was a valid warranty on such sale, and a breach thereof, and a valid rescission of the contract, then the consideration for these notes failed, and it was the duty of the defendant to return the note which remained unpaid, and to restore the money which had been paid by the plaintiff in satisfaction of the other two notes. One of the notes was paid to the agent on his promise to remedy defects in the machine, and the other one was paid by plaintiff to one claiming to be an innocent purchaser for value. In making these payments, plaintiff did not waive his right to a return of the money on failure of the consideration of these notes. The other note having been negotiated before maturity by the defendant, it is

⁶ Part of the opinion is omitted.

liable to plaintiff for the amount due thereon if a failure of consideration is established. *Fahey v. Harvesting Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554 (decided at this term,) and cases there cited.

The sufficiency of the complaint was challenged, but it is clearly sufficient. It shows a breach of warranty and rescission of the contract which would entitle plaintiff to recover the amounts paid on the two notes and the amount due on the note negotiated by defendant before maturity. All these facts relating to these notes are fully set forth in the complaint. It therefore states a cause of action. The court directed a verdict for the plaintiff for the full amount claimed. From the judgment entered upon this verdict, defendant appeals. Was it error to direct this verdict? The machine was sold by an agent of the defendant whose name was Crafts. The warranty was oral. It was, in substance, that the binder would do as good work as any other binder in the market. There is no controversy either as to the fact of this warranty, or as to the fact of a breach thereof.

But it is insisted that the plaintiff did not rescind the contract promptly, after discovering the defect. This would be fatal to plaintiff's recovery unless he was induced to delay action by defendant's promise to make the machine work. Section 3591, Comp. Laws. The sale was in July, 1889, and the binder was not in fact returned until August 4, 1890. It is undisputed, however, that the agent Crafts repeatedly promised to put the binder in working order, and requested the plaintiff to keep it, to enable him (Crafts) to do this. A number of efforts to fix it were made during the season of 1889, but they all proved abortive. Each time the attempt failed, plaintiff expressed his determination to return the binder, but was deterred from doing so by Crafts' repeated promises to make the binder do good work, and his often-repeated entreaties that the plaintiff keep the machine, to give him (Crafts) a chance to make it fulfill the warranty. Finally, not being able to make it work during the harvest of 1889, Crafts promised plaintiff that, if he, plaintiff, would keep the binder until next season, he would agree to see that it was put in good working order for next harvest, to do as good work as any other machine in the market. Relying on this promise, plaintiff did keep the binder.

It was urged on the argument that Crafts gave his mere personal guaranty that this should be done, but we do not so construe the record. It was undoubtedly understood by both the parties that he was acting for the defendant in making this promise. During all of this time Crafts was agent for the defendant in the sale of these machines. He was their general agent for this purpose, being intrusted with this business of selling generally, and not merely with the sale of this particular machine. "An agent for a particular transaction is called a special agent. All others are general agents." Section 3962, Comp. Laws. As such agent he had authority to make the warranty on the sale already referred to. Section 3985, *Id.*; *McCormick v. Kelly*, 28

Minn. 135, 9 N. W. 675. It cannot be doubted that he had power to represent and bind the defendant by his subsequent conduct and promises, inducing plaintiff to refrain from prompt action on discovery of the defects in the machine. *Snody v. Shier*, 88 Mich. 304, 50 N. W. 252; *Pitsinowsky v. Beardsley*, 37 Iowa, 9.

Defendant, through its authorized agent, by its promises and conduct, lulled the plaintiff into a sense of security against prejudice from his failure promptly to restore the property, and cannot be heard to insist that the delay until the year 1890 is fatal to plaintiff's right to rescind for breach of warranty. *Snody v. Shier*, 88 Mich. 304, 50 N. W. 252; *Manufacturing Co. v. Kelly*, 26 Ill. App. 394. In fact, there was a new warranty made in the fall of 1889 that the machine would do as good work the next season as any other binder in the market. In the month of August, 1890, after repeated efforts by plaintiff to induce Crafts to send an expert to fix the binder in accordance with his promise, one was finally sent out to plaintiff's farm. It was Saturday night before the work was finished. Early Monday morning plaintiff started the machine. It did not do good work. The same day it was returned by plaintiff to the same place from which he took it when he purchased it, and he then notified the agent Crafts that he had returned it, and demanded a return of his notes. If Crafts was agent for the defendant during the year 1890 in the sale of its machines, there can be no doubt that plaintiff acted promptly in returning the property to defendant, in view of the promises and conduct of defendant's agent inducing delay, and therefore amounting to a waiver of return until after defendant's final effort to fix the machine. That Crafts could give a new warranty, after failure to make the binder work during the harvest of 1889, cannot be doubted. There being a breach of a former warranty, plaintiff had it in his power to return the binder, and have back his notes, or a new machine in place of the defective one. This new machine would be delivered upon the same warranty which related to the old one. The parties could agree, after the return of the old one, to a new contract of sale of the old binder with warranty, and therefore the agent could make a new warranty without the formality of a return, which he could not prevent.

This same reasoning leads to the conclusion that the agent could attach to the continued holding of the binder by the plaintiff a condition that if it should not do as good work the next season as any other binder in the market he would take it back. This is precisely what he did agree to. It amounted, in effect, to a keeping of the machine by the plaintiff on trial, with a right to return it next year if it should fail to work as stipulated by defendant's agent. Had the binder been returned as sold Crafts would have had power to sell it on trial. *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Oster v. Mickle*, 35 Minn. 245, 28 N. W. 710. He therefore had power to promise to take back the binder if it did not work as warranted, without

the necessity of a formal surrender of the machine and the cancellation of the contract of sale and the making of a new contract. Whatever view we take of the matter,—whether we regard the old warranty as undisturbed, or consider that a new warranty was made relating to the work the binder would do during the year 1890, or that an agreement was made to take back the binder if it should fail to do good work during the year 1890,—we reach the same conclusion. We hold, as a matter of law, that the binder was returned in time. * * * Affirmed.⁷

3. BREACH OF IMPLIED WARRANTY

NORTHWESTERN CORDAGE CO. v. RICE.

(Supreme Court of North Dakota, 1896. 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563.)

Action by the Northwestern Cordage Company against D. E. Rice. From a judgment for plaintiff, defendant appeals.

CORLISS, J. Defendant ordered of the plaintiff 7,000 pounds of pure Manilla twine. Plaintiff, acting on this order, shipped to defendant a lot of twine, which the evidence tends to prove was not pure Manilla twine, but an inferior article, worth much less in the market. Defendant having been sued upon the notes given for the purchase price of this twine, he interposed as a counterclaim an alleged cause of action founded upon breach of warranty. On the trial the district judge directed a verdict in favor of the plaintiff. Defendant appeals.

At the outset, we are required to determine whether, in fact, there was a warranty. It is true that the plaintiff did not, in terms, warrant that the twine sold by it to defendant was pure Manilla twine. Indeed, it made no representations whatever in written instrument, or by oral statement. But, when it accepted from defendant an order for pure Manilla twine, it, in contemplation of law, agreed to sell defendant an article answering to that description. That a sale of an article by a particular description constitutes a warranty that the article answers to that description, is well settled. *Benj. Sales*, pp. 619-622, and cases cited; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Dounee v. Dow*, 64 N. Y. 411; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Lewis v. Romtree*, 78 N. C. 323; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30; 28 Am. &

⁷ Compare *Milliken v. Skillings*, 89 Mo. 180, 36 Atl. 77 (1896), and see *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670 (1908).

Eng. Enc. Law, p. 776; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Love v. Miller*, 104 N. C. 582, 10 S. E. 685; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. Said the court in *Gould v. Stein*, "The general rule is familiar and admitted, that a sale of goods by particular description imports a warranty that the goods are of that description."

We cannot say, under the facts of this case, that the defendant, as a matter of law, has waived his right to rely upon the warranty. The twine delivered was Manilla twine, but it was not pure Manilla. It is probable that a special examination of it before acceptance would have resulted in the discovery that it was not as warranted. But the case is not one of the failure of the vendor to deliver any article of the character of that ordered. It was not the purchase of twine, followed by the delivery of some other article. We hold that under the facts of this case the defendant cannot be deemed, as a matter of law, to have waived his right to rely upon the warranty. It is impossible to lay down a rule on this subject which can be readily applied to the varied facts of different cases. Cases may arise where it is apparent that the purchaser could not have relied on the warranty when he accepted the goods, or that he has waived his right to insist upon such warranty. But we think it would be an extremely unjust rule to interpret as an implied waiver the conduct of the purchaser in receiving the goods which do not exactly correspond to the warranty, merely because he might, by examination, have discovered the defect. It often happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract of warranty. In many cases the inference of a purpose to rely upon the warranty is stronger than the inference of a purpose to pay the price of a good article for a defective one. In the case at bar the jury would have been justified in finding that defendant could not, without particular examination, have discovered that the twine was not pure Manilla. In favor of one who has warranted an article, the purchaser does not owe the duty of careful inspection. He may rely on the warranty.

There is much confusion in the authorities. This is the consequence of too much refinement in reasoning, and the making of many nice distinctions. The law on this subject should be adjusted to the needs of the business world, and be made as simple as possible. Without attempting to anticipate the exceptions to the general rule which in the future it may be found necessary to establish, we believe it to be in the interests of justice, and to fairly express the sense of business men upon the subject, that whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of the warranty, although an inspection of the property would have led to a discovery of the

breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach. *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *English v. Commission Co. (C. C.)* 48 Fed. 196; *Lewis v. Rountree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; *Hege v. Newsom*, 96 Ind. 431; *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; 2 *Benj. Sales* (6th Am. Ed.) p. 856, note 29; *Daylor v. Hooglund*, 39 Ohio St. 671; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; *Parks v. Tool Co.*, 54 N. Y. 586; *Zabriskie v. Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 374, 16 Am. St. Rep. 753.

In *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783,—the best-considered case to be found on the point in the books,—the court say: "The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond,—evidence of more or less force, according to the circumstances of the case. If the goods be accepted without objection at the time, or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defect, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency; placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court."

In *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451, the court say, at page 456, 57 Fed., page 416, 6 C. C. A.: "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty; some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found, upon examination, to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the con-

tract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled, that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable, in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." "There is nothing in the decisions of this court conflicting with our views in this case.

It is claimed by plaintiff that defendant, by renewing the notes given by him for the purchase price of the twine, waived his right to recoup damages for breach of the warranty. But it is evident that, if a cause of action once existed in his favor for damages, the mere giving of renewal notes would not, of itself, extinguish that cause of action. Even payment of the purchase price would not have that effect. *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976. The circumstance that a purchaser had given his note, or had paid for the property, with full knowledge of the facts, would generally be persuasive—and might, unexplained, be conclusive—evidence that there was in fact no breach of warranty, or possibly that the purchaser had waived his right. We do not, however, wish to be understood as holding that a mere waiver by implication, without consideration, would necessarily operate to defeat the claim for damages. But the purchaser might negative the presumption of waiver, if such an act could create such a presumption, by showing that, as a matter of fact, he distinctly asserted his right to rely upon his claim for damages.

In the case at bar it appears that the new notes were given at the solicitation of the plaintiff's agent, and on his promise that defendant should be allowed his damages. We do not say that a cause of action can be predicated on this arrangement. Serious questions of the extent of the agent's authority, and of the contradiction of a written contract by parol evidence, would have to be met, before we could decide the case on that theory. But the evidence was certainly competent to explain the circumstances surrounding the giving of the new notes, to the end that defendant might rebut any possible inference from that fact unfavorable to his claim for damages. The trial court should have submitted the question of breach of warranty to the jury, with proper instructions. For the error of the court in refusing to do so, and in directing a verdict for plaintiff, the judgment is reversed, and a new trial is ordered. All concur.

TALBOT PAVING CO. v. GORMAN.

(Supreme Court of Michigan, 1894. 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 93.)

Action by the Talbot Paving Company against Charles A. Gorman. Judgment for defendant, and plaintiff brings error.

HOOKE, J. The plaintiff contracted with the defendant for the delivery f. o. b., Detroit, of a quantity of Medina paving stone, the same to answer the requirements of Detroit specifications, of which defendant had a copy. The contract was made by correspondence. At request of defendant, the plaintiff advanced \$2,500 upon the contract, and afterwards made other payments, leaving a balance of \$1,338.47. The requisite amount of stone was shipped to Detroit, where it was unloaded, and used by the plaintiff upon its paving jobs, upon which it was at work. It is claimed upon its behalf that the stone did not conform to the specifications rendering it necessary to put work upon them, of which it seasonably informed the defendant, with the suggestion that he might send men to do such work if he chose, and that he did send men who did some such work. This action was brought by the purchaser, who claimed a balance his due of \$684.49 for such work done by it and for some broken stone. The defendant claimed the amount of \$1,338.47. The defendant recovered \$1,432, which probably included some interest.

The court instructed the jury that: "There can be no question, with reference to this executory contract, that the acceptance by the Talbots in the first instance precluded their recouping, as we may say, for the character of the stone, because it did not come up to the Detroit specifications. In other words, they had the opportunity to examine the stone as it was delivered on the cars in this city, and, unless there was something further than that,—unless there was some other promise on the part of the defendant,—then the defendant would be entitled to a verdict for the amount claimed, viz. one thousand three hundred and thirty-eight dollars and forty-seven cents, with interest from November 5, 1892." The court instructed the jury further that if they should find that the defendant came to Detroit, and agreed with the plaintiff to pay for the work mentioned, there was a moral consideration that would support the promise, and the amount should be allowed to the plaintiff.

The principal question in this case is whether the plaintiff, by receiving and using the stone, accepted them as a full compliance with the contract, or whether he had a right to take them, and recover his damages by way of recoupment or action growing out of their failure to equal the specifications. There are cases which hold that an acceptance of goods precludes such recovery, and there are others which hold the contrary. On principle, the distinguishing feature seems to be a warranty. If the sale is without a warranty, and affords an op-

portunity for ascertaining whether the goods conform to the description, the doctrine of *caveat emptor* applies, and an acceptance cuts off all rights of recovery. The vendee should decline to receive the goods, and sue for a breach of the contract. If, on the other hand, the sale is with a warranty, the vendee may lawfully receive the goods, and recover or recoup damages upon the warranty, which is held to be a collateral undertaking. It is believed that the principle is generally recognized. In addition to cases cited by counsel, see *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831.

It seems to be in the present case; counsel for appellant insisting that an implied warranty exists, while, upon the other hand, it is said that the provision in relation to the specifications is a condition precedent merely. The contract was an executory contract, and may fairly be said to have contemplated the manufacture of the curbing from a specified stone, in accordance with specified dimensions and workmanship. If the agreement to furnish such stone of the specified dimensions was a warranty at all, it is difficult to understand why it was not an express warranty, and, if it was such, there can be no implied warranty that the stone should conform to the specifications. Indeed, this does not seem to be claimed. These things were a necessary part of the description of the commodity, and nothing more, unless the face of the contract justifies the conclusion that it was intended as a warranty. Neither party asserts this, and so we turn to the question of implied warranty. The exact point made by plaintiff appears to be that, inasmuch as the defendant knew what the specifications were, the law implied a warranty of fitness. A pertinent inquiry is, "A fitness for what?" Was it fitness for the paving jobs that the plaintiff had on hand? If this be claimed, it is a sufficient answer to say that the evidence fails to disclose that the defendant knew what jobs he had. Moreover, if the law is to imply that the stone was to be fit for the job, it must be, because defendant knew what the job actually required, and had undertaken to provide that, and his liability would be tested by that. But this was not so. He only knew what the specifications required. They might be right or wrong. He had no means of determining, and it was not left to defendant's judgment to make suitable stone for the jobs. He had simply undertaken to deliver certain stone of given dimensions. If he should deliver such he would be entitled to pay. If he did not, it could hardly be claimed that he could require acceptance on the ground that the stone was suitable, or better adapted, to the purpose of the plaintiff than as though made according to direction. Clearly, if plaintiff had furnished specifications, and had a right to insist on the stone being in conformity thereto, regardless of defendant's judgment, it could not sustain the proposition that the law should imply a warranty to make them conform to some other test; and manifestly it cannot be said that knowledge of the use intended should require defendant to vary

from his contract as to dimensions. The conclusion appears to us irresistible that no such warranty as this can be implied.

Breen v. Moran, 51 Minn. 525, 53 N. W. 755, is cited as a case "upon all fours" with this, but we infer from a perusal of that case that the contractor there undertook to furnish stone for a particular purpose which he understood. And in that case the court based the right to recover upon a warranty, and not the failure to perform a condition precedent; thus recognizing the rule of law stated. The distinction between conditions precedent and warranty is clearly recognized in the Minnesota cases cited in *Breen v. Moran*. See *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150.

An examination of the brief of the plaintiff's counsel will show that all of the cases cited are based on the existence of a warranty. In this respect they are in harmony with the cases cited by opposing counsel. See *Potter v. Lee*, 94 Mich. 140, 53 N. W. 1047. We notice one or two that seem to rest upon facts leading to the inference that a warranty may have been found from a bare promise to deliver goods of a given description. Such is perhaps the rule in South Carolina, and possibly other states. But if such can be called a warranty, it is an express warranty, and in this case would be a warranty to deliver stone according to specification, and not a warranty to deliver those fit for the purpose that plaintiff had in hand, whatever that may have been. The correctness of those decisions may be questioned in view of the English and American cases in opposition to them. They seem to be based upon language of Mr. Starkie in his work on Evidence, and a discussion to be found in notes to the case of *Cutter v. Powell* in 2 Smith, Lead. Cas. 1, substantially implying that when the vendee uses the goods to prevent loss or injury the rule should not apply. See *Cox v. Long*, 69 N. C. 7; 2 Smith, Lead. Cas. (8th Am. Ed.) p. 36. But as counsel has not discussed the point, or planted their case upon any such claim, we do not feel called upon or at liberty to discuss or decide the question.

It was claimed by the plaintiff that the defendant came to Detroit, and agreed to pay for the work in question. The court instructed the jury that plaintiff should recover if they found such to be the fact, which was as favorable a charge as the plaintiff was entitled to. This view of the case renders it unnecessary to discuss the question in relation to the admission of evidence of the meaning of the term "f. o. b.," as the plaintiff was not injured by the evidence. The judgment must be affirmed. The other justices concurred.

4. DIMINUTION OF DAMAGES—RECOUPMENT

NORTHWESTERN CORDAGE CO. v. RICE.

(Supreme Court of North Dakota, 1896. 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563.)

See ante, p. 275, for a report of the case.

TALBOT PAVING CO. v. GORMAN.

(Supreme Court of Michigan, 1894. 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96.)

See, ante, p. 279, for a report of the case.

UNDERWOOD v. WOLF.

(Supreme Court of Illinois, 1890. 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40.)

Action by Frederick W. Wolf against Phineas L. Underwood, James Viles, Jr., and Thomas Jordan to recover the price of refrigerating machines and apparatus furnished and set up by plaintiff for defendants in their packing-house under a written contract. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendants appeal.

MAGRUDER, J.⁸ The contract bears date February 8, 1886. By its terms the appellee was to furnish and erect the refrigerating machinery, with engine, pump, pipes, etc., in the packing-house of appellants, and have the same in complete working order by the 8th day of May, 1886. The evidence tends to show that the whole plant was not ready for use until the 1st day of July, 1886. * * *

But the main controversy between the parties arises upon the following provision in the contract: "And it is further agreed * * * that if the machines have fulfilled the guaranties made for them in this agreement by 1st of September, 1886, then said party of the second part [appellants] shall accept the same; and all payments to be made after the payment to be made on July 1, 1886, shall be promissory notes, dated on the day of acceptance of the plant, with interest after maturity." The defendants refused to give, and have never given, the notes thus provided for. What are the guaranties which were to be fulfilled? The plaintiff, Wolf, agreed and guarantied that the machine would maintain certain degrees of cooling temperature in certain rooms in the packing-house, and would cool the rooms within a certain specified time; that it would cool a certain number of

⁸ Part of the opinion is omitted.

hogs, of a specified weight, within a specified time; that the power required to drive the machinery should not exceed a certain limit; that the fuel required to produce the steam to do the work of the engines should not exceed a certain amount; that the loss of ammonia in doing the work should not exceed a certain number of pounds; that the refrigerating machines should be of the best material and workmanship; that the engine should be capable of running the packing-house machinery in addition to the compresses; that the iron piping to be furnished should be such as would be necessary to carry and convey the brine required for the proper cooling of the rooms.

In considering the nature of these guaranties it is unnecessary to discuss any nice distinctions between warranties on the one side, and conditions precedent or descriptions of the property on the other. It is sufficient that the guaranties are treated as warranties, and their non-fulfillment, if they were not fulfilled, will be regarded as a breach of warranty. Inasmuch as the plant was to be completed by May 8, 1886, and was to be accepted if the guaranties were fulfilled by September 1, 1886, it is manifest that the period between these two dates was to be made use of for the purpose of testing the machines, in order to ascertain whether or not they were such as they were guarantied to be. It is also sufficiently manifest that, if the machines failed in any of the particulars named in the guaranties, the defects which would thus be shown to exist must be regarded as patent defects, as contradistinguished from latent defects. Where there is a sale and delivery of personal property in *presenti*, with express warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty; or, when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set-off. This is a well-settled rule.

In the present case the contract is executory. The title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some states that where the contract is thus executory, and a time is fixed for making a test, the acceptance and use of the property, after such time has passed, amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this state. In the present case the evidence tends to show that the defendants took possession about July 1, 1886, of the machines placed in their packing-house by the plaintiff, and had been using the same up to the time of the trial of the cause in the court below. The chief complaint of the appellants is that, under the instructions given by the trial court, the jury were led to regard the acceptance and use of the machinery by the defendants as an abandonment of all right to damages for breach of the warranties. We are unable to regard this complaint as well founded. We agree with the counsel for appellants, in the main, in their view of the law. We think that, even where the contract is executory, the claim for dam-

ages on account of a breach of the warranty will survive the acceptance of the property. Chitty on Contracts, (11th Ed.) at page 652, says: "Where, therefore, the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value, it is competent to the purchaser, in all cases, to prove the breach of warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by non-compliance with the warranty." The previous discussion of the authorities by the author, before arriving at the conclusion thus announced, shows his meaning to be that the breach of the warranty may be proven in reduction of damages, not only in the case of the sale of a specific chattel, but also in the case of an executory contract; as, for example, "where an article is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain purpose." *Id.* 647-652.

In Benjamin on Sales, (volume 2, § 1356, 4th Amer. Ed.) it is said: "The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them; all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action, or now by a counter-claim in the vendor's action for the price." If the retention of the property by the buyer for a longer time than is reasonable for a trial does not waive his right to damages in an action by the vendor for the purchase price, then there is no reason why his retention of the property for a longer time than that fixed in the contract for a trial should amount to such waiver.

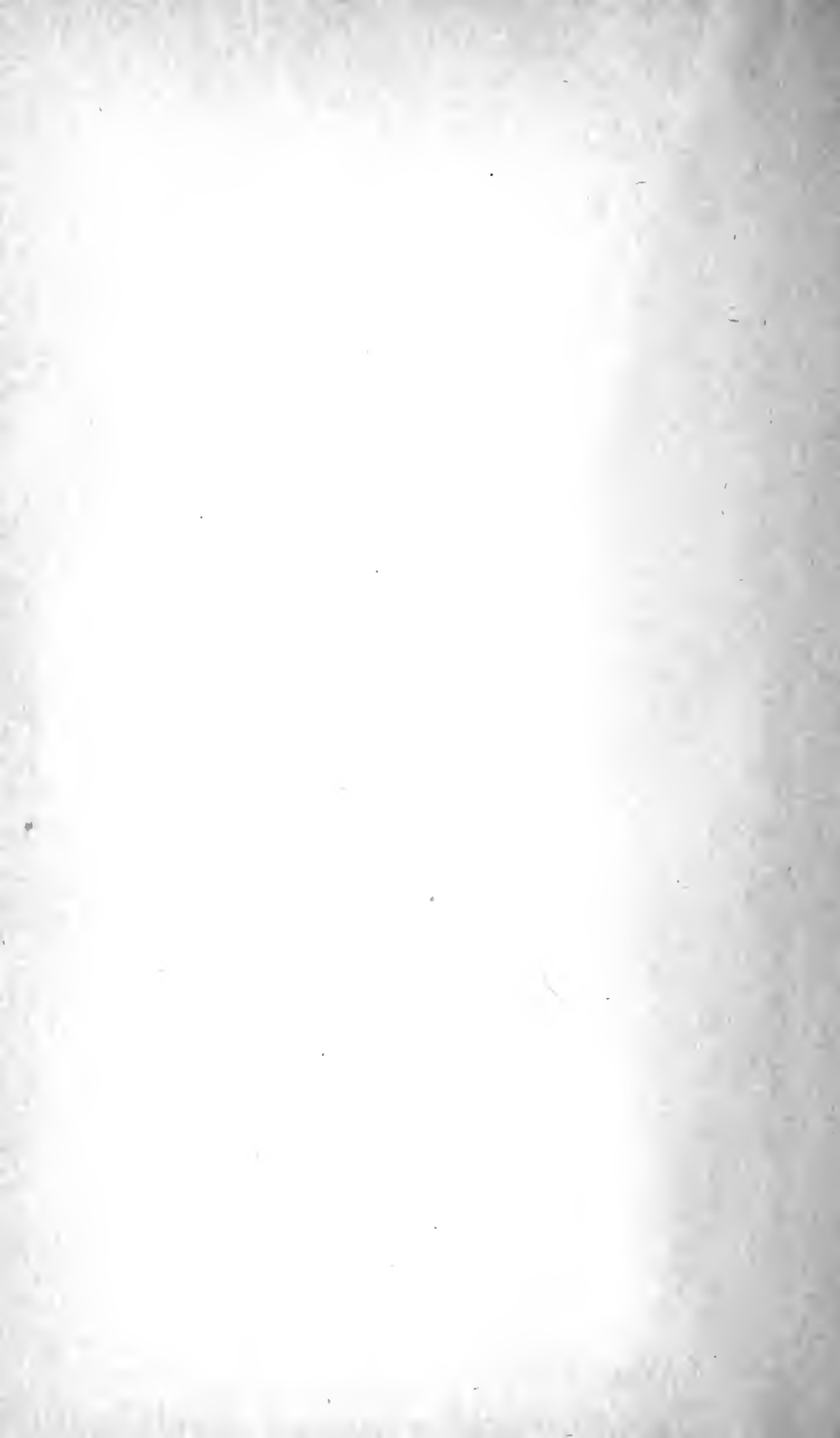
The rule, as announced by these textwriters, has been held to be the law in this state. In *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560, there was an executory contract for the sale and delivery of corn, with an implied warranty that it should be of a fair and merchantable quality. It was there said: "It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties; but it will not preclude the party from showing and setting up the actual defect in quality and condition. * * * He could, * * * under the general issue, prove the facts out of which the warranty arose, the breach, and his damages by way of recoupment," etc. *Crabtree v. Kile*, 21 Ill. 184. In *Strawn v. Cogswell*, 28 Ill. 457, which was a petition for a mechanic's lien founded upon a contract to furnish iron castings for a grist-mill, and where the defense was that the work was not done in a workman-like manner, and the materials were not of the quality required by the contract, we said: "Improvements of this description being permanent and fixed, and requiring skill to test their sufficiency,

their being received and being put to use is not such an acceptance as estops the party from claiming damages for their being defective."

In the case at bar the refrigerating machines were so built into the packing-house, and so much a part thereof, that their removal could only have been accomplished with difficulty, and perhaps with injury to the house itself. The mere use of them by the defendants after September 1, 1886, might not, of itself, amount to such an acceptance as would preclude them from claiming damages for defects. *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Peck v. Brewer*, 48 Ill. 54. In *Doane v. Dunham*, 65 Ill. 512, and same case, 79 Ill. 131, the distinction between executory and executed contracts was recognized, and it was held that, in the former, the law gives the buyer a reasonable time for making an examination of the chattels sold; that it is for the jury to determine, under all the circumstances, what is such reasonable time; that a failure to make the examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract, and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages.

The only difference between that case and the one at bar is that there the law gives time for examination or test, while here the contract fixes the time. The same rule, however, will apply to both cases. *Estep v. Fenton*, 66 Ill. 467. In *Owens v. Sturges*, 67 Ill. 366, it was held that, where the contract is unexecuted, the buyer may retain the property, and show the warranty and breach to reduce the recovery even though he neglected to return the property upon discovery of the breach. In *Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621, the contract was to set up a printing-press in complete running order in the defendant's press-room, within 70 days from the acceptance of the plaintiff's proposition, with warranty that the press should give complete satisfaction, and granting to the defendant 30 days' time from the setting up of the press to decide whether the warranty was good. The defendant gave no notice of its intention after the 30 days had passed, but kept the press. It was held that the continued use of the press indicated the vesting of the title in the buyer, and that the defendant could recoup his damages from the contract price if there had been a breach of the warranty.

We are therefore of the opinion that the defendants had a right, in the case at bar, to offset, against plaintiff's claim for the contract price of the machines, such damages as they were able to show that they had sustained from a failure to fulfill the guaranties, if there was such a failure. * * * Affirmed.







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